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1499

No. 5019

United States
1493
Circuit Court of Appeals
For the Ninth Circuit.

O. L. SHAFTER ESTATE COMPANY, a Corporation,

Plaintiff in Error,

vs.

W. T. MOONEY, Trustee in Bankruptcy of the Estate of WILLIAM BARTHOLOMEW,
Bankrupt,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

FILED

DEC 8 1926

F. B. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

REUBEN G. HUNT, Esq., Claus Spreckels Bldg.,
San Francisco, Cal.,
Attorney for Plaintiff and Appellee.

CHARLES W. SLACK, Esq., and **EDGAR T. ZOOK**, Esq., Alaska Commercial Building,
San Francisco, Cal.,
Attorneys for Defendant and Appellant.
[1*]

In the District Court of the United States in
and for the Southern Division of the Northern
District of California.

No. 1657.

W. T. MOONEY, as Trustee in Bankruptcy of the
Estate of WM. BARTHOLOMEW,
Plaintiff,

vs.

O. L. SHAFTER ESTATE CO., a Corporation,
Defendant.

COMPLAINT TO RECOVER PREFERENCE
UNDER BANKRUPTCY ACT.

Now comes plaintiff above named and for cause
of action against defendant above named alleges:

I.

On the 17th day of October, 1925, the above-named

*Page-number appearing at the foot of page of original certified
Transcript of Record.

Wm. Bartholomew filed in the above-entitled court his voluntary petition in bankruptcy with schedules, and thereafter and on the 23d day of November, 1925, the said Wm. Bartholomew was duly adjudicated a bankrupt by said Court upon said petition and further proceedings in the matter of the administration of the estate of the bankrupt were referred by said Court to A. B. Kreft, Esq., a Referee in Bankruptcy thereof. Thereafter and on the 12th day of December, 1925, the said W. T. Mooney, with the approval of the said Referee was appointed trustee of the estate of the bankrupt *as* his first meeting of creditors. Thereafter and on the 18th day of December, 1925, the said W. T. Mooney duly qualified as such trustee. Ever since said 18th day of December, 1925, the said W. T. Mooney has been and now is the duly appointed, qualified and acting trustee in bankruptcy [2] of said estate.

II.

At and during all the dates and times herein mentioned, the above-named O. L. Shafter Estate Co., was and now is a corporation, organized and existing under the laws of the State of California, with its office and principal place of business at the city and county of San Francisco, in said State.

III.

At the time of the filing of the said petition in bankruptcy and at and during all of the dates and times during the four months preceding the said filing and subsequent to on or about the 1st day of October, 1925, the said bankrupt was insolvent

and indebted to general creditors upon antecedent debts, including the defendant, except in so far as the debt of defendant was satisfied as hereinafter mentioned, in an aggregate amount of about \$10,000.

IV.

On or about said 1st day of October, 1925, and while so indebted to defendant, the bank transferred to the defendant, out of the property of the bankrupt, which was subject to the claims of the said general creditors, the sum of \$1,764.25, in full payment of such antecedent general debt, so due the defendant as aforesaid, and thereby diminished the estate of the bankrupt to that extent.

V.

The effect of the enforcement of the said transfer will be to enable defendant, as such general creditor, to receive a greater percentage of its said debt, as of the date of the said transfer, than the other of the said creditors of the same class, to wit, the said class of general creditors. [3]

VI.

At the time of the said transfer as aforesaid, the defendant, or its agent acting therein, had reasonable cause to believe that the effect of the enforcement of the said transfer would be to enable the defendant, as of the date thereof, to obtain a preference voidable under the provisions of the Bankruptcy Act, as above related.

VII.

Subsequent to his appointment and qualifications

as aforesaid, and prior to the commencement of this action, plaintiff demanded of defendant the return of the said sum of \$1,764.25 to the bankrupt estate, but defendant at the time of said demand refused and ever since has refused and does now refuse to return the same or any part thereof to the bankrupt estate.

WHEREFORE, plaintiff prays for judgment against defendant for the sum of \$1764.25, together with interest thereon at the rate of 7% per annum, from and after the time of the commencement of this action until paid and for the costs of this action.

RUBEN G. HUNT,
Attorney for Plaintiff.

State of California,
County of Sonoma,—ss.

W. T. Mooney, being first duly sworn, deposes and says:

I am the plaintiff named in the foregoing complaint. I have read the same and know the contents thereof and the same is true of my own knowledge, except as to the matters stated on information or belief and as to those matters I believe it to be true.

W. T. MOONEY.

Subscribed and sworn to before me this 5th day of April, 1926.

J. W. GWINE,
Notary Public in and for the County of Sonoma,
State of California.

[Endorsed] : Filed April 6, 1926. [4]

[Title of Court and Cause.]

ANSWER OF DEFENDANT.

The defendant O. L. Shafter Estate Company, a corporation, sued herein as O. L. Shafter Estate Co., a corporation, for its answer to the complaint herein of the above-named plaintiff, denies as follows:

Denies that on or about the 1st day of October, 1925, or while indebted to the said defendant, or at any other time, the above-named bankrupt transferred to the said defendant, out of the property of the said bankrupt subject to the claims of the general or other creditors, or to the claims or claim of any of them of the said bankrupt, upon antecedent or other debts, or otherwise or at all, the sum of \$1,764.25, or any other sum, in full or in part payment of any debt, antecedent, general or otherwise, due the said defendant.

WHEREFORE, the said defendant prays that the said plaintiff take nothing by this action, and that the said defendant have and recover judgment against the said plaintiff for its costs.

CHARLES W. SLACK and
EDGAR T. ZOOK,
Attorneys for Defendant.

State of California,

City and County of San Francisco,—ss.

A. Howard, being first duly sworn, deposes and says:

That affiant is an officer, to wit, the secretary, of

O. L. Shafter Estate Company, a corporation, the defendant in the within-entitled action, and as such secretary makes this affidavit for *on* on behalf of the said defendant corporation; that affiant has read the foregoing answer, and knows the contents thereof; and that the same is true of affiant's own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that affiant believes it to be true.

[7]

A. HOWARD.

Subscribed and sworn to before me this 28th day of April, 1926.

[Seal] MINNIE V. COLLINS,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed April 29, 1926.

Receipt of a copy of the within answer of defendant admitted this 29th day of April, 1926.

REUBEN G. HUNT,
Attorney for Trustee. [8]

[Title of Court and Cause.]

STIPULATION WAIVING TRIAL BY JURY.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, which is set for trial for Tuesday the 24th day of August, 1926, at the hour of 10 o'clock A. M. of that day, that the said cause shall be tried by the said Court without a jury.

Dated this 11th day of August, 1926.

REUBEN G. HUNT,

Attorney for Plaintiff.

CHARLES W. SLACK and

EDGAR T. ZOOK,

Attorneys for Defendant.

[Endorsed]: Filed August 11, 1926. [9]

At a stated term, to wit, the July Term, A. D. 1926, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Friday, the 3d day of September, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable WILLIAM H. SAWTELLE, District Judge for the District of Arizona, designated to hold and holding this Court.

[Title of Cause.]

MINUTES OF COURT—SEPTEMBER 3, 1926—
ORDER ALLOWING AMENDMENT TO
COMPLAINT AND ANSWER AND DI-
RECTING JUDGMENT TO BE ENTERED
IN FAVOR OF PLAINTIFF.

* * * By consent it is ordered that the complaint and the answer be amended on the face thereof in the particulars stated. The evidence being closed the case was thereupon argued, at the

conclusion of which it was ordered that judgment be entered herein in favor of plaintiff as prayed, on findings to be filed. [10]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Friday, the 10th day of September, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable WILLIAM H. SAWTELLE, District Judge for the District of Arizona, designated to hold and holding this Court.

[Title of Cause.]

MINUTES OF COURT—SEPTEMBER 10, 1926
—ORDER DENYING DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT IN ITS FAVOR.

Now comes Edgar T. Zook, Esq., attorney for defendant, and moves the Court for an order directing entry of judgment herein in favor of the defendant, and after hearing Mr. Zook, it was ordered that said motion be and the same is hereby denied, to which order the defendant duly excepted. [11]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on regularly for trial before the above-entitled court, sitting without a jury, a jury having been waived by the parties, this 3d day of September, 1926, upon the complaint of the plaintiff and the answer of the defendant filed herein, Reuben G. Hunt, Esq., appearing as attorney for the plaintiff and Charles W. Slack, Esq., and Edgar T. Zook, Esq., appearing as attorneys for the defendant, and testimony having been offered and received on behalf of the issues raised by the pleadings, and the case having been submitted to the Court for decision, the Court hereby makes the following

FINDINGS OF FACT.

On the 17th day of October, 1925, the named Wm. Bartholomew filed in the above-entitled court his voluntary petition in bankruptcy with schedules, and thereafter and on the 23d day of November, 1925, the said Wm. Bartholomew was duly adjudicated a bankrupt by said court upon said petition and further proceedings in the matter of the administration of the estate of the bankrupt were referred by said court to A. B. Kreft, Esq., a referee in bankruptcy thereof. Thereafter and on the 12th day of December, 1925, the said W. T. Mooney, with the approval of the said referee was appointed trustee of the estate of the bankrupt at

his first meeting of creditors. Thereafter and on the 18th day of December, 1925, the said W. T. Mooney duly qualified as such trustee. Ever since said 18th day of December, 1925, the said W. T. Mooney has been and now [12] is the duly appointed, qualified and acting trustee in bankruptcy of said estate.

II.

At and during all the dates and times herein mentioned, the defendant, O. L. Shafter Estate Co., was and now is a corporation, organized and existing under the laws of the State of California, with its office and principal place of business at the city and county of San Francisco in said state.

III.

At the time of the filing of the said petition in bankruptcy and during the four months prior thereto, the said bankrupt was insolvent and indebted to general creditors upon antecedent debts, including the defendant, except in so far as the debt of defendant was satisfied as hereinafter mentioned, in an aggregate amount of about \$10,000.

IV.

On or about said 1st day of October, 1925, and while so indebted to defendant, the bankrupt transferred to the defendant, out of the property of the bankrupt, which was subject to the claims of the said general creditors, the sum of \$1,764.25, in full payment of such antecedent general debt, so due the defendant as aforesaid, and thereby diminished the estate of the bankrupt to that extent.

V.

The effect of the enforcement of the said transfer will be to enable defendant, as such general creditor, to receive a greater percentage of its said debt, as of the date of the said transfer, than the other of the said creditors of the same class, to wit, the said class of general creditors. [13]

VI.

At the time of the said transfer as aforesaid, the defendant, or its agent acting therein, had reasonable cause to believe that the effect of the enforcement of the said transfer would be to enable the defendant, as of the date thereof, to obtain a preference voidable under the provisions of the Bankruptcy Act, as above related.

VII.

Subsequent to his appointment and qualification as aforesaid, and prior to the commencement of this action, plaintiff demanded of defendant the return of the said sum of \$1,764.25 to the bankrupt estate, but defendant at the time of said demand refused and ever since has refused and does now refuse to return the same or any part thereof to the bankrupt estate.

From the foregoing findings of fact, the Court hereby makes the following

CONCLUSIONS OF LAW.

The plaintiff is entitled to a judgment against the defendant for the sum of \$1,764.25, together with interest thereon at the rate of seven per cent (7%) per annum, from and after the 16th day of

April, 1926, the time of the commencement of this action, amounting to \$50.95, and the costs of this action.

Let judgment be entered accordingly.

Dated: September 27, 1926.

WM. H. SAWTELLE,
District Judge.

[Endorsed]: Filed September 27, 1926.

Receipt of a copy of the within proposed findings of fact and conclusions of law is hereby admitted this 7th day of September, 1926.

CHARLES W. SLACK and
EDGAR ZOOK,
Attorneys for Defendant. [14]

(Title of Court and Cause.)

JUDGMENT ON FINDINGS.

This cause having come on regularly for trial upon the 3d day of September, 1926, before the Court sitting without a jury; a trial by jury having been specially waived by written stipulation filed; Reuben G. Hunt, Esq., appearing as attorney for plaintiff, and Charles W. Slack, Esq., and Edgar T. Zook, Esq., appearing as attorneys for defendant, and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation having rendered its

decision and filed its findings and ordered that judgment be entered in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that W. T. Mooney, as Trustee in Bankruptcy of the Estate of William Bartholomew, Plaintiff, do have and recover of and from O. L. Shafter Estate Co., a corporation, defendant, the sum of One Thousand Seven Hundred Sixty-four Dollars and 25/100 (\$1,764.25) Dollars, together with interest thereon at the rate of seven per cent (7%) per annum, from and after the 16th day of April, 1926, the time of the commencement of this action, amounting to \$50.95, together with his costs herein expended taxed at \$52.00.

Judgment entered September 27th, 1926.

WALTER B. MALING,

Clerk. [15]

[Title of Court and Cause.]

BILL OF EXCEPTIONS ON WRIT OF ERROR.

Be it remembered that the above-entitled cause came regularly on for trial on the 3d day of September, 1926, before Honorable William H. Sawtelle, Judge of the above-entitled court, sitting without a jury, a jury having been waived by written stipulation of the parties duly filed with the Clerk of the said court, Reuben G. Hunt, Esq., appearing as attorney for the plaintiff, and Messrs. Charles W. Slack and Edgar T. Zook appearing as attor-

neys for the defendant, whereupon the following proceedings were made:

TESTIMONY OF WILLIAM BARTHOLOMEW, FOR PLAINTIFF.

WILLIAM BARTHOLOMEW, called as a witness for the plaintiff, testified as follows:

Direct Examination.

I reside at 2215 Buchanan Street, San Francisco, California. Up to October, 1925, I resided at the "N" Ranch, at Point Reyes, Marin County, California, which I was leasing from the defendant under a written lease. [17]

Thereupon, the lease between the defendant, O. L. Shafter Estate Company, and the witness, Bartholomew, dated September 22, 1924, was offered and read in evidence and marked Plaintiff's Exhibit 1. The said lease is in the words and figures following:

PLAINTIFF'S EXHIBIT No. 1.

THIS INDENTURE, made this 22d day of September, 1924, between O. L. Shafter Estate Company, a corporatior (hereinafter called the "Owner"), the party of the first part, and Wm. Bartholomew (hereinafter called the "Renter"), the party of the second part,

WITNESSETH:

That the Owner hereby leases unto the Renter, and the Renter hereby hires from the Owner, that certain portion of the so-called Point Reyes Ranch, belonging to the Owner, situated in the County of

Marin, State of California, known as the "N" Ranch, together with one hundred and eight (108) cows, more or less, twenty-four (24) two-year-old heifers, more or less, and twenty-three (23) yearling heifers, more or less, for the term commencing on the 1st day of October, 1924, and ending on the 30th day of September, 1925, at and for the rent of two thousand five hundred dollars (\$2,500), payable and to be paid by the Renter to the Owner, in lawful money of the United States, in equal installments of six hundred and twenty-five dollars (\$625) respectively, on or before the 31st day of December, 1924, on or before the 31st day of March, 1925, on or before the 30th day of June, 1925, and on or before the 1st day of September, 1925, and at and for the further rent of twenty-six (26) of the best heifer calves, or, at the election of the Owner, an equal or less number of the best bull calves, in substitution therefor, calf for calf, from such of the best cows hereby leased as shall [18] come on or freshen at the beginning of the season of 1924-1925 deliverable and to be delivered by the Renter to the Owner, either in the main corral of the said premises hereby leased, or at such other place on the said premises, or at such place on the said Point Reyes Ranch, or at the railroad station at Point Reyes, as may be designated by the Owner, and at such time or times as may be requested of the Renter by the Owner.

The parties hereto hereby covenant and agree as follows:

1. The Renter shall pay and deliver the said rents to the Owner at the times and in the manner herein provided therefor. The said calves, and any calves which may be substituted therefore, as hereinafter provided, may be branded and marked by the Owner at the time or times which the same shall be delivered by the Renter to the Owner, as aforesaid, and thereafter, the said calves, so branded and marked, at the election of the Owner, may be permitted by the Owner to remain on the said premises, and, in that event, the same shall be continued to be cared for by the Renter. No calves shall be butchered or otherwise disposed of by the Renter until the said twenty-six (26) calves shall be delivered by the Renter to the Owner, as hereinabove provided. If any of the said calves which shall be so permitted by the Owner to remain on the said premises shall die or be missing prior to the said 30th day of September, 1925, the Renter shall deliver to the Owner, as hereinabove provided from time to time, as may be requested of the Renter by the Owner, and not later than the said 30th day of September, 1925, an equal number of best calves from the said best cows hereby leased in substitution for such of the said calves as shall die [19] or be missing as aforesaid, and if not so delivered by the Renter to the Owner, then the Renter, at the election of the Owner, shall pay to the Owner, on demand, the fair market price thereof at the time or times when the same should be delivered by the Renter to the Owner, as hereinabove provided. All increase of the said cows and heifers hereby leased,

except as herein otherwise provided, and all other produce of the same, shall belong to the Renter, but all such increase, except as herein otherwise provided, shall be disposed of by the Renter as soon as reasonably possible. Bulls for the said cows and heifers shall be supplied to the Renter by the Owner, and the Renter shall breed the said cows and heifers to the said bulls at such times only as shall be directed by the Owner, and no other bulls shall be allowed by the Renter to run with the said cows and heifers without the permission of the Owner.

2. The said premises shall be used by the Renter for dairy purposes and for purposes incidental thereto, and for no other purposes. The Renter shall supply, at his own cost, such equipment as shall be necessary to the proper operation of the said premises by the Renter for the purposes for which the same are hereby leased. The Renter may sell his said equipment and other property, on the expiration of the term of this lease, to other persons who shall rent the said premises from the Owner, but no such sale shall be made by the Renter at a price in excess of the fair market value of the said equipment and other property.

3. The Renter shall live upon the said premises and shall personally manage the same. No persons objectionable to the Owner shall be permitted by the Renter to occupy or to remain on the said premises. No portion of the said premises shall be sublet by the Renter, and no animals of others shall be [20] allowed by the Renter to be pastured or fed on the said premises without the written consent

of the Owner. No assignment of this lease, whether voluntary or involuntary, shall be made by the Renter without the written consent of the Owner. No sale or other disposition shall be made by the Renter of this lease, or of any interest or profit therein, or arising out of this lease, except as herein otherwise provided, without the written consent of the Owner.

4. The Renter shall care for the said cows, heifers, calves, and bulls in the very best manner. Such portions of the said premises as may be suitable for cultivation, and as may be designated by the Owner, shall be cultivated by the Renter in the very best manner, and in proper seasons therefor, in grain, hay and other crops suitable for feed for the said livestock and for such horses, mules, hogs and poultry as may be kept by the Renter on the said premises, as hereinafter provided, and the seed for such crops shall be clean and of the best quality and shall be supplied by the Renter at his own cost, and such crops shall be cared for by the Renter in the very best manner.

The said crops shall belong to the Owner, and shall not be sold or otherwise disposed of, or removed from the said premises, by the Renter, but such thereof as may be necessary therefor shall be fed by the Renter to the said animals and poultry on the said premises during the term of this lease. All such other feed as shall be necessary for the said animals and poultry shall be supplied by the Renter at his own cost. So far as possible,

there shall be on the said premises, on the said 30th day of September, 1925, enough hay for a number of cows, heifers, bulls, horses and mules equal to the number herein specified, for the remainder of the fall of 1925, and for the winter of 1925-6, and for the spring of 1926. If any brush land on the said premises shall be cleared by the Renter, the Renter, however, may cultivate the same in such [21] crops as he may see fit, during the term of this lease, and for one (1) additional year should this lease be extended or renewed by the Owner for that period, and such crops may be sold or otherwise used or disposed of by the Renter, and the proceeds of any such sale or other disposition shall belong to the Renter.

5. The Renter shall be permitted to keep on the said premises such number of horses and mules only, not to exceed ten (10), as shall be necessary for and as shall be used in the operation of the said premises by the Renter. The Renter shall also be permitted to keep on the said premises such number of hogs and poultry only, of good breed and of sound condition as may be required to consume otherwise waste products, of the said dairy and of the said premises, and the said hogs and poultry and all increase and proceeds therefrom shall belong to the Renter. All animals and poultry on the said premises shall be kept by the Renter under proper restraint. All gates and bars on the said premises shall be kept closed by the Renter.

6. The Renter, at his own cost, shall keep the buildings, fences, gates, bars and other improve-

ments, including telephone poles and lines, watering troughs, wells, springs and other places of water supply, and roads now on the said premises, or which may be placed or constructed thereon or therein during the term of this lease, in good order, condition and repair, injury thereto by fire, act of God and public enemies excepted, and the Renter shall build all necessary division fences on the said premises, the materials for such repairs and fences to be furnished the Renter by the Owner, and the Owner to be the sole judge of kind and quantity of materials to be so furnished, and the times and places of furnishing the same. All improvements made on the said premises, whether by the Owner or by the Renter, shall belong to the Owner, and shall not be removed from or changed on the said premises by the Renter. The buildings, corrals, pens, and yards on the said premises shall be kept by the Renter [22] in a clean and orderly condition. The manure from the said corrals, pens and yards shall be removed therefrom and scattered by the Renter over the fields on the said premises, as may be directed by the Owner. The barns, dairy house and other out-buildings and the corrals and yards of the said premises shall be whitewashed by the Renter, at his own cost, in a proper manner, as directed by the Owner, once during the term of this lease. The Renter shall use all reasonable efforts to keep the said premises free from noxious weeds and plants and to keep the *the* said premises free from ground squirrels. In the event that the Renter shall fail to perform any of the work re-

quired by this paragraph to be performed by the Renter, after request by the Owner of the Renter to perform the same, such work may be performed by the Owner, at the election of the Owner, and the Renter shall pay to the Owner, on demand, the cost of the same.

7. The Renter, except as hereinabove otherwise provided, shall not cut or destroy any trees, shrubs or plants growing on the said premises, without the consent of the Owner, but may otherwise take such fire-wood and other timber and materials for fencing and repairs either from the said premises, or, with the permission of the Owner, from other lands of the Owner, as shall be necessary for use by the Renter on the said premises.

8. The Owner shall have the right to keep and have kept on the said premises not more than two (2) head of horses and mules, and not more than six (6) head of cattle, in addition to the said cows and heifers leased and in addition to the said bulls, and in addition to the said calves which shall be delivered by the Renter to the Owner, as aforesaid. The Owner shall also have the right to sell or otherwise dispose of such of the said cows and heifers hereby leased as may be or become diseased, or otherwise unsuitable for the purposes for which the same are hereby leased, as may become dry. [23] The Owner shall also have the right to lease to others the privilege of hunting and fishing on the said premises, and the use of the said premises, for those purposes, within the permission granted by the Owner therefor, shall be permitted by the Renter

to such lessees. The Renter shall not hunt, fish, capture or take game or fish from the said premises, or permit any of his employees or any members of his family so to do, and the Renter shall use all reasonable efforts to prevent others who shall not have the permission of the Owner so to do, to hunt, fish, capture or take game or fish from the said premises, and, generally, the Renter shall use all reasonable efforts to prevent trespassing on the said premises. The Owner, through its agents, and employees, and other tenants of the Owner, and, with the permission of the Owner, the owners and their tenants of lands adjacent to the lands of the Owner, shall also have reasonable ingress to and egress from and over the said premises. The Owner shall also have the right to cut and to have cut trees, shrubs and plants from the said premises and to remove the same and other materials therefrom for use on the said premises, or for use on other lands of the Owner, or for the purpose of sale or other disposition by the Owner.

9. If any rents payable or deliverable under this lease shall be due and unpaid or undelivered, or if any other moneys payable under this lease shall be due and unpaid, at the times when the same should be paid or delivered, as hereinabove provided, or if default shall be made in the performance of any of the covenants and agreements of this lease on the part of the Renter to be performed, then and from thenceforth it shall be lawful for the Owner to re-enter into or upon the said premises, and to remove all persons therefrom, and to reposess and

enjoy the said premises as in its first and former estate, and, at the election of the Owner, to terminate this lease, and the [24] remedies conferred upon the Owner under and by virtue of this lease, and otherwise by the law, shall be cumulative, and the exercise by the Owner of any of the said remedies shall not impair the right of the Owner to exercise any other of the said remedies. If any action to recover any of the said rents or other moneys, or for the breach or to restrain the breach of any of the covenants or agreements of this lease on the part of the Renter to be performed, or for the possession of the said premises, or other property hereby leased, shall be commenced by the Owner, the Renter shall pay to the Owner a reasonable attorney's fee, and, if judgment shall be recovered by the Owner in such action, the amount of such fee shall be included as a part of the judgment in such action.

10. The Renter, on the last day of the term of this lease, or other sooner termination of the estate hereby granted, shall peaceably and quietly leave, surrender and yield up unto the Owner the said premises and all the other said property hereby leased in as good order and condition as the same now are or may be placed during the term of this lease, reasonable use and wear thereof and injury thereto and destruction thereof by fire, act of God and public enemies excepted. In the event that the Renter shall hold over after the expiration of the term of this lease, such holding shall be at the will of the Owner.

(Testimony of William Bartholomew.)

11. Any failure or neglect of the Owner to take advantage of any cause for the termination of this lease, or for the forfeiture of the estate hereby granted, shall not be a waiver of any other cause for such termination or forfeiture then existing, or a waiver of any cause for such termination or forfeiture subsequently arising.

12. The terms of this lease and the covenants and agreements hereof shall bind and enure to the benefit of, as the case may be, the successors and assigns of the Owner and the [25] assigns of the Renter; but nothing contained in this lease shall be deemed to permit the assignment of this lease or of the estate hereby created, or of any interest therein of the Renter, whether voluntary or involuntary, without the consent in writing of the Owner first had and obtained.

IN WITNESS WHEREOF, the Owner, the party of the first part, has hereunto, and to a duplicate hereof, caused its corporate name to be subscribed and its corporate seal to be affixed, by its proper officer thereunto duly authorized, and the Renter, the party of the second part, has hereunto, and to the said duplicate hereof, set his hand and seal, the day and year first hereinabove written.

O. L. SHAFTER ESTATE COMPANY.

By CHARLES W. SLACK,

Vice President. (Corporate Seal)

WM. BARTHOLOMEW. (Seal)

WITNESS.—(Continuing.) I paid rent all the times I was there, for about three years, and I

(Testimony of William Bartholomew.)

paid all the rent with the exception of \$1400 odd. I dealt with L. C. Eastman, representing the Shafter Estate Company. He is the superintendent of the ranches up there. I did not apply for an extension of this lease or a new lease when this lease terminated. He demanded the payment of the rent. I told him I did not have the money. I was figuring on selling out and as soon as I sold out the place they would get their money. I owned all the equipment on the ranch, horses and wagons and milking machines and dairy utensils and engine and stuff. All they owned was the land, the cows and the buildings. I owned the rest of the stuff. [26]

W. T. Hall came to me first about two weeks before my lease was up and wanted to buy the ranch, so I sold the ranch for \$6,500. He wanted the place and I wanted to sell. He said he would take the ranch for \$6,500. He told me that he did not have all the money. He said he could raise about half of the money. We went over to Mr. Gwynn, of the Mercantile Trust Company, and Mr. Gwynn told Mr. Hall he would loan him half of the money, so we came home, and everything was fine and dandy.

About two or three days before the lease was up Mr. Hall came out and I asked him for a deposit on the place, which he would not give me. He said that Mr. Eastman told him not to give me any money at all. I figured then that there was something wrong somewhere and I told him that I would not sell the place, so he went away. So I

(Testimony of William Bartholomew.)

figured that I would sell some hogs and some stuff off the ranch and try to make up part of the rent which I owed to the Shafter Estate and take a new lease for another year. So I sold 26 head of hogs.

The night before the lease was up I met Mr. Eastman at Inverness and he told me that Mr. Hall was going out there the following morning, the first of the month, to take possession of the ranch. So I told him that he was not going out there, that I had no deposit on the place, that I had no money and that he was not going to take possession until I got some money. He said he was going out there. So the next morning Mr. Hall came out to the ranch. He said, "I cannot pay you the \$6,500.00. Mr. Eastman told me to take a pencil and paper and take down the stuff on the ranch and just give you what the stuff is worth on the ranch." I said, "No. No pencil and paper will you use here." He said, "All I can give you is \$4,500 for the ranch and for the stuff." So I did not know what to do about it. [27]

I went down and spoke to Mr. Martinelli, Mr. Grandi and Mr. Scillachi, who were creditors of mine. I told them the story.

I went down that morning to Inverness, and I met Mr. Hall and Mr. Eastman down there. Mr. Eastman asked me to go up to his house with Mr. Hall. We went up there. Mr. Hall asked me if I wanted to give him the place for the money. I told him he might as well have it, I guess, or something like that, so Mr. Hall wrote out Mr. Eastman

(Testimony of William Bartholomew.)

a check for some money. I did not see what it was. We went over to Mr. Martinelli's store and fixed everything in his store for \$4,500. After the \$1,700 was paid by Mr. Eastman, there was \$2,760 left or something like that. Mr. Martinelli and I asked Mr. Hall if he would not make it out for \$2,800 even money. There was \$1,400 and some dollars for the rent and \$300 for calves which were lost in the 1923 storm, and so he said he would make it for the \$2,800 even money. I did not see the check Mr. Hall gave Mr. Eastman, but it was supposed to be seventeen hundred and some dollars. In that conversation, they were to get \$1,400 back rent which I owed and \$300 for the calves before Mr. Hall could get the lease. That was said in the conversation between Hall and Eastman and myself on that occasion. There were some papers made out between Mr. Hall and myself at Mr. Martinelli's store.

Thereupon the following document was offered and read in evidence and marked Plaintiff's Exhibit 2:

PLAINTIFF'S EXHIBIT No. 2.

LETTER-HEAD OF THE A. MARTINELLI
COMPANY.

Inverness, Marin Co., Calif.

Oct. 1-1925. [28]

I, the undersigned, W. T. Hall, agree to pay for the benefit of the creditors of Mr. Wm. Bartholomews the net sum of \$2,800.00 out of the sale of all

(Testimony of William Bartholomew.)
the personal property on the N. Ranch. Pt. Reyes,
Calif—

W. T. HALL.

I agree to sell all of my personal property to Mr. W. T. Hall for the net sum of (\$2,800) Twenty-eight Hundred Dollars.

WM. BARTHOLOMEW.

Q. To whom did Hall deliver to the \$2,800?

A. They had a meeting of the creditors in Point Reyes a couple of days later.

Q. The question was, who did he hand over the \$2,800 to? A. I don't know.

A. It did not pass into your hands?

A. No, I never saw anything of it.

Q. At this time you were insolvent, were you not—you owed a good deal more than you could pay? A. Yes, sir.

Thereupon the following document was offered and read in evidence marked Plaintiff's Exhibit 3:

PLAINTIFF'S EXHIBIT No. 3.

LETTER-HEAD OF THE A. MARTINELLI
COMPANY.

Inverness, Marin Co., Calif.

Oct. 1, 1925.

I, Wm. Bartholomew, elect L. C. Eastman as trustee, for the purpose of paying my creditors *pro rata* to the extent of \$2,800 which is to be turned over to L. C. Eastman by Wm. T. Hall in

(Testimony of William Bartholomew.)
payment for my personal belongings on the N.
Ranch, consisting in part of the following:

27 Hogs
9 Horses
1 separater
2 gas engines
1 Ford auto
Milking machines

Wagons, Harness, circle saw, and other miscellaneous tools and implements on the N. Ranch.

WM. BARTHOLOMEW. [29]

WITNESS.—(Continuing.) I signed Plaintiff's Exhibit 3. Mr. Eastman asked me to sign it and I signed it. Mr. Hall wanted to know what stuff was on the ranch and if the stuff was still there. That is why it was fixed up this way. He wanted to know if the stuff was on the ranch and if I would sign a paper to the effect that it was on the ranch, and I said I would. I understood when I was signing that Exhibit 3 that I was making Mr. Eastman trustee for the benefit of my creditors. I don't remember what conversation passed at that time, it is over a year ago now.

About two days later, there was a meeting of creditors in Point Reyes. Mr. Gwynn of Petaluma, Mr. Tomasini of Petaluma, Mr. Scillachi and Mr. Grandi of Point Reyes, Mr. Martinelli of Inverness and Mr. Eastman were there. Mr. Eastman was representing the defendant at this meeting. The only thing I remember that was said about this transaction in the presence of Mr. Eastman was

(Testimony of William Bartholomew.)

that the creditors asked Mr. Eastman about the \$300 that he took off for the price of the calves, and Mr. Eastman said he did not know anything about it. Mr. Gwynn got up and told him he did know all about it because he had got the money already. It was said that I owed \$1,400 and some dollars for back rent. That is about all I remember about it. Mr. Eastman at that time was still acting as trustee for the benefit of my creditors. That is about the only time I knew he acted.

There was a meeting in Petaluma afterwards. Mr. Eastman was not present. At the meeting with Mr. Eastman and Mr. Hall when Mr. Hall turned over to Mr. Eastman a check, I thought that check was for the \$1,700. Mr. Eastman told Mr. Hall, and of course I knew myself, that before any one could take over the ranch they had to pay that back rent of mine and that \$300 for calves which they say that I either lost or stole. [30]

Cross-examination.

I stated that I sold the ranch to Hall for \$6,500. There was no written bill of sale passed between us to that effect. Mr. Hall came to my place and wanted to know if I wanted to sell the place, and I told him I did. He wanted to know what I wanted for the ranch and I told him that I wanted \$6,500. He asked me what I paid for the ranch and I told him I paid \$6,250 and I spent about \$2,500 for stuff I put on the place. Mr. Hall did not say much. He said he would let me know later. He

(Testimony of William Bartholomew.)

came back a day or so later and was satisfied with the place and said he would take it at \$6,500. I told him all right he could have it. That was about two weeks before my lease terminated and I went off there. My lease terminated on September 30, 1926.

Q. What did you propose to sell to Mr. Hall for \$6,500 and what did he propose to buy from you for \$6,500? A. All of the stuff on the ranch.

Q. What do you call all of the stuff on the ranch?

A. He saw all that was on the ranch at that time.

Q. What was the stuff? Describe it generally.

A. There were 9 head of horses, about 50 or 55 head of hogs, 3 milking machines, a wagon, a Ford automobile truck. All of the stuff on the ranch that belonged to me was sold to him for \$6,500.

Q. Was there some hay there?

A. There was a barn full of hay.

Q. Did you sell the hay too for the \$6,500?

A. I didn't sell nothing. I told him he could have the whole place for \$6,500.

Q. The hay included?

A. Of course it was included.

Q. You knew from your lease that you did not own the hay, didn't you?

A. Well, I was not going to take the hay away. It is in the cow-barn and it would have stayed there.

[31]

Q. You knew from your lease that the hay would belong to the company?

(Testimony of William Bartholomew.)

A. The hay would belong to the place if he bought the place.

Q. You could not sell the hay?

A. I did not sell the hay.

Q. And you included in your price of \$6,500 goodwill, did you not?

A. There was no goodwill mentioned at all.

Q. But that is what you understood it to be, that your position there on the ranch was worth something?

A. There was no goodwill mentioned. He bought the place for \$6,500.

Q. But that included the going concern; you were running a dairy business at the time, were you not?

A. Yes.

Q. And you made the figure \$6,500? A. Yes.

Q. He said he would pay it? A. Yes.

Q. Did you ask for a deposit? A. I did.

Q. What did he say to you?

A. He told me Mr. Eastman would not allow putting up a deposit.

Q. Did he tell you why? A. No.

Q. He told you Mr. Eastman said not to pay you any money? A. Yes.

Q. And then that sale, that bargain that you were trying to negotiate with Mr. Hall, fell through at that time; in other words, there was nothing doing so far as you were concerned or so far as he was concerned to carry out the arrangement by which you were to sell what you had there for \$6,500 and he was to pay you that amount; the whole thing fell

(Testimony of William Bartholomew.)

through? A. At the time I sold him the place—

Q. Just answer the question.

A. Just wait until I get through.

Q. No, just answer the question. Mr. Hall told you that [32] Mr. Eastman said not to pay you any money, did he? A. Yes.

Q. And then you did not get any deposit?

A. No.

Q. So that talk fell through, there was nothing else said on that occasion was there? A. No.

Q. In other words, the deal for \$6,500 fell through because he would not pay you a deposit, because Mr. Eastman had said not to pay any money to you, is that right? A. Yes.

Q. And that is what you had in mind when you say you sold the place to Mr. Hall for \$6,500?

A. Yes, I sold the place to Mr. Hall for \$6,500.

Q. You mean as you explained it? A. Yes.

WITNESS.—(Continuing.) I sold 26 head of hogs after I told Mr. Hall that I would not sell out to him. I figured on raising some money and staying there another year. I told Mr. Hall this about three days before the end of the month. It was after the conversation when I asked Mr. Hall for a deposit. After I sold the hogs I told him that he could not buy me out, that I would not sell out to him and that I would try to raise the rent. I sold the 26 head of hogs to James Kehoe for \$313. That sale fell through. Mr. Hall told me that Mr. Eastman stopped the check.

(Testimony of William Bartholomew.)

The first talk about \$4,500 was on the morning after my lease was up. Mr. Hall came out to my place about 8 o'clock in the morning. He said, "Bill, I was talking to Mr. Eastman and he told me to come out and get a pencil and paper and take down the stuff you have on the ranch and offer you whatever we find the stuff is worth." I told him that he would not do anything of the sort. After a while he said, "All the money I can raise is \$4,500." So I didn't know what to say, and I went down and [33] talked it over with Mr. Martinelli, and he told me to let the thing go if I wanted to. That was after my lease expired. It was on October 1st.

The first talk I ever had with Hall about \$4,500, the new price, was on this morning after the lease was up. I sold a set of Fairbanks scales off the ranch besides the hogs. The hogs which I sold and the scales were included in the price of \$6,500. I told Mr. Hall that I would not sell out to him, and I was going to raise some money and pay part of the rent and that was why I sold the hogs. After the check was stopped, I went and took the hogs from James Kehoe and sold them to my brother. The hogs did not come back to the ranch and were not there on October 1st. They were delivered to my brother at Nicasio.

I saw Mr. Eastman the night before my lease expired. I think it was on September 30th. He told me that Mr. Hall was going out the next morning and take possession of the ranch and he told me to

(Testimony of William Bartholomew.)
sell out to Mr. Hall as rapidly as possible. He didn't tell me that I had better close the deal before my lease expired.

TESTIMONY OF A. MARTINELLI, FOR PLAINTIFF.

A. MARTINELLI, called as a witness for the plaintiff, testified as follows:

Direct Examination.

I reside at Inverness, Marin County, California, where I am engaged in a general merchandise business. I have known Mr. Bartholomew, Mr. Eastman of the O. L. Shafter Estate Company, and Mr. Hall for some time. I was a creditor of Mr. Bartholomew during September and October, 1925.

I first heard that Mr. Hall and Mr. Bartholomew were negotiating for the sale of Mr. Bartholomew's property on the "N" [34] Ranch about two or three weeks, or possibly a month, before October 1st. I first talked with Mr. Eastman about it the day before, or about the day this transaction was concluded between Mr. Hall and Mr. Bartholomew and myself. Plaintiff's Exhibit 2 was drawn up by me in the office of my Inverness store. Outside of the signature, the paper is all in my handwriting. Mr. Hall and Mr. Bartholomew were present when I drew it up. Mr. Eastman came in later on after this document was drawn up. Mr. Hall and Mr. Bartholomew were still there. Nothing was said at that time about the price. It had

(Testimony of A. Martinelli.)

all been settled then. As far as I remember, the only conversation when Mr. Eastman was present, was, who was to have charge of the \$2,800.

It was understood between Mr. Hall, Mr. Bartholomew and myself that the whole "net sum of \$2,800," which I wrote in Plaintiff's Exhibit 2, was the amount available for the benefit of the creditors. As far as I can remember this was agreed to by all, and it was simply a question of who should take charge of it for the benefit of the creditors. I wrote "the net sum of \$2,800" because I felt that I wanted to emphasize that that was all that was coming to us, I suppose. It was well understood. Nothing was said about what the total price was after we drew up the papers. Before I drew up the papers they themselves had a difference of a few dollars between 1,700 and some odd, and so I told them to make it \$2,800 even. I suggested to Hall to make it \$2,800 and make it an even sum. Nothing else was said in that conversation about why I should insert in this agreement the net sum of \$2,800.

The COURT.—I think it is apparent from Mr. Bartholomew's testimony, as the record now stands, that \$1,400 was for the [35] back rent and \$300 was for the loss of the calves and that that is the reason the check was drawn for \$2,800.

Thereupon the plaintiff rested.

TESTIMONY OF L. C. EASTMAN, FOR DEFENDANT.

L. C. EASTMAN, called as a witness for the defendant, testified as follows:

Direct Examination.

I reside and have resided in Inverness, Marin County, for five and a half years, during all of which time I have been, and now am, the superintendent of the defendant company.

I know Mr. William T. Hall, who is the present tenant of the "N" Ranch. His tenancy began on October 1, 1925, under a written lease. I recognize the instrument now shown to me together with the signature of Mr. Hall. It was made in my presence at my house. I recognized the other signature as that of Charles W. Slack, vice-president of the defendant company.

The said instrument, which was thereupon offered and read and marked Defendant's Exhibit "A," is in the words and figures following:

DEFENDANT'S EXHIBIT "A."

THIS INDENTURE, made this 1st day of October, 1925, between O. L. Shafter Estate Company, a corporation (hereinafter called the "Owner"), the party of the first part, and William T. Hall (hereinafter called the "Renter"), the party of the second part,

WITNESSETH:

That the Owner, for and in consideration of the

rents to be paid and delivered, and the covenants and agreements to be performed by the Renter, as hereinafter provided, and for and in further consideration of the sum of one thousand seven hundred sixty-four and 25/100 dollars (\$1,764.25), paid to the Owner by [36] the Renter, the receipt of which is hereby acknowledged by the Owner, and subject to the payment and delivery of the said rents and the performance of the said covenants and agreements by the Renter, and on the condition that the said rents shall be paid and delivered and that each and all of the said covenants and agreements shall be fully and duly performed by the Renter, has leased, demised and let, and by these presents does lease, demise and let, unto the Renter, that certain portion of the so-called Point Reyes Ranch, belonging to the Owner, situated in the County of Marin, State of California, known as the "N" Ranch, together with one hundred and seventeen (117) cows, more or less, and twenty-two (22) yearling heifers, more or less, for the term commencing on the 1st day of October, 1925, and ending on the 30th day of September, 1926, at and for the rent of two thousand and two hundred dollars (\$2,200) payable, and to be paid by the Renter to the Owner, in lawful money of the United States, in equal installments of five hundred and fifty dollars (\$550), respectively on or before the 31st day of December, 1925, on or before the 31st day of March, 1926, on or before the 30th day of June, 1926, and on or before the 1st day of September, 1926, and at and for the further rent

of twenty-six (26) of the best heifer calves, or, at the election of the Owner, an equal or less number of the best bull calves in substitution therefor, calf for calf, from such of the best cows hereby leased as shall come in or freshen at the beginning of the season of 1925-1926, deliverable and to be delivered by the Renter to the Owner either in the main corral in the said premises hereby leased, or at such other place on the said premises, or at such place on the said Point Reyes Ranch, or at the railroad station, at Point Reyes, as may be designated by the Owner, and at such time or times as may be requested of the Renter by the Owner.

[37]

The parties hereto hereby covenant and agree as follows: [38]

12. The Terms of this lease and the covenants and agreements hereof shall bind and enure to the benefit of, as the case may be, the successors and assigns of the Owner and the assigns of the Renter; but nothing contained in this lease shall be deemed to permit the assignment of this lease or of the estate hereby created, or of any interest therein, of the Renter, whether voluntary or involuntary, without the consent in writing of the Owner first had and obtained. [44]

IN WITNESS WHEREOF, The Owner, the party of the first part, has hereunto, and to a duplicate hereof, caused its corporate name to be subscribed and its corporate seal to be affixed by its proper officer thereunto duly authorized, and the

(Testimony of L. C. Eastman.)

Renter, the party of the second part, has hereunto, and to the said duplicate hereof, set his hand and seal, the day and year first hereinabove written.

O. L. SHAFTER ESTATE COMPANY.

By CHARLES W. SLACK, (Corporate Seal),
Vice-President.

WILLIAM T. HALL. (Seal) [45]

WITNESS.—(Continuing.) The lease was executed in duplicate by Mr. Hall. I negotiated this lease, under the instructions of Judge Slack, on October 1st. When the lease was signed, I received \$1,764.25 from Mr. Hall, by check, payable to the order of the defendant. This payment was made as a consideration for his obtaining the lease, and was based on the \$1,464.25, which was still due from Bartholomew, and \$300 based on the fact that the rental of the ranch had to be reduced from \$2,500 to \$2,200, and the run-down condition of the ranch. The normal cash rental of the ranch was \$2,500, but Hall would only pay us \$2,200. That made a difference of \$300. I came to an understanding with Hall, which was approved by Judge Slack, before October 1st, as to the terms on which he could have the ranch, and Mr. Hall, at that time, had offered to the company, through me, \$2,200 cash rent. I told Hall he could have the lease on October 1st, but he would have to pay the company \$1,764.25. It was not certain that the company could deliver possession of the ranch to the new

(Testimony of L. C. Eastman.)

tenant on October 1st. I did not know whether Bartholomew would give up possession on October 1st. I told Hall that if he did not give up possession, we would force him to leave. I had talked with Bartholomew a number of times before the month of September, concerning the obtaining of a new tenant when his lease expired. In the first part of 1925, Bartholomew asked me to try and obtain a tenant for him.

I was present at a conversation between Judge Slack and Bartholomew in the latter part of June, 1925, at which the question of Bartholomew's selling out came up. We met Bartholomew on the county road, between the "N" Ranch and Inverness, near the ranch gate. Judge Slack and I were present. Judge Slack told Bartholomew that he did not seem to be getting along very well on the ranch, and things were becoming so run-down and in such a shape that he would have to get off; that he, Judge Slack, could [46] not stand it any longer. He told Bartholomew to look for a buyer, or a new tenant. Judge Slack discussed the subject of about 25 head of heifers that had been lost on the ranch, and inquired into it. Bartholomew told Judge Slack that they had disappeared and that they could not be found. I had made a search for those heifers but had never found any of them. Judge Slack and I were bound for the "N" Ranch when we met Bartholomew. Bartholomew said that he would look for a new tenant.

(Testimony of L. C. Eastman.)

After the conversation, Judge Slack and I went out to the "N" Ranch, and Bartholomew went on his way to Point Reyes. When Judge Slack and I came out to the ranch, we looked around the buildings, and, as a result of our visit, I proceeded to make repairs, and probably a week or two later I had a man on the ranch to do some painting and repairing of the fences and gates and cleaning up in general. I could get Bartholomew to do very little in the way of repairs or cleaning up of the property.

I recall that Judge Slack left the state about the 12th or 14th of September, and returned on September 28th. During that time, Hall called upon me with reference to leasing the ranch. He first called about September 17th, and asked me, if he bought out Bartholomew, would he have a lease on the "N" Ranch. I told him that Judge Slack was in the East and that I would take it up with him as soon as he returned. I did not, at that time, say anything to Hall about what he or any one else who took a new lease of the ranch would have to pay as a consideration for the lease.

After Judge Slack returned, I told Hall that he could have the lease on October 1st, by paying the defendant \$1,700. The day the lease was to expire, Hall told me that the ranch was in such condition that he felt that all he would be willing to pay would be \$2,200, instead of the regular rent of \$2,500. I told him that I would take the matter up with Judge [47] Slack, and I did so. As a re-

(Testimony of L. C. Eastman:)

sult of my conversation with Judge Slack, I told Hall that he could have the ranch for a rental of \$2,200 by paying \$1,700, or a little over, as consideration for the new lease to him, that is, if the company obtained possession from Bartholomew after that lease had expired. I told Hall not to pay Bartholomew any money, that he was very heavily in debt, and that any money that he would get from the sale of his equipment would have to go to the creditors. I told Bartholomew the same thing. My arrangement with Hall as to the new lease was confirmed by Judge Slack.

During the month of September, I told Bartholomew that he must do his best to find a new tenant before the lease expired. My last conversation with him of that sort was on the night of September 30. On that occasion I asked Bartholomew if he had sold, or had made any deal, or if he settled any deal for selling out the ranch to Hall. He said he had not. I advised him to go that night and come to some terms of settlement with Hall while he still had a lease on the place, because the next day his lease would be expired and I told him that, if I were in his place, I would certainly go that night and come to the best terms possible.

I next saw Bartholomew on the following morning, October 1st, at my house. Hall was also there. Hall came just before Bartholomew. On that occasion this lease, Defendant's Exhibit "A," was signed. Hall read it over before he signed it. I particularly called his attention to the provisions

(Testimony of L. C. Eastman.)

on the first page that he should pay the defendant \$1,764.25 as a consideration for the lease. I received the lease that morning from Judge Slack before Hall and Bartholomew arrived at my house. Hall gave me the check for \$1,764.25. Bartholomen was present at the time. Before I asked Hall to sign the lease, I asked Bartholomew if he was [48] ready to leave the ranch. He said he was, that all he had to do was to go out and get his suitcase and he was going that afternoon. I then asked Hall if he wanted to take the lease. Hall and Bartholomew had some discussion about the purchase by Hall of the remainder of Bartholomew's personal property on the ranch. Hall told Bartholomew that he was not going to give him—I think he mentioned \$4,500, or something of that sort. He said he was asking too much for the ranch, and that he was not going to give him as much as he asked for it. Hall said that he would not pay altogether more than \$4,500. He did not say anything about the amount he paid the defendant. That is all the conversation I recall.

On that occasion, at my residence, Hall and Bartholomew left my house to discuss the selling price further. They were discussing it as they left the house and went over towards Martinelli's store, which is about one hundred yards distance from my residence. I drove over to the store shortly after Bartholomew and Hall left my house, and they were talking with Martinelli out in the road. Then they came over to me, and Mr. Martinelli told me that

(Testimony of L. C. Eastman.)

they had come to terms, that Hall was giving Bartholomew \$2,800. He said, "Let us all go in the office and we will make up some paper to have the bargain in writing." So we all went into Mr. Martinelli's office. At that time, I believe, Mr. Martinelli wrote out a paper which is an exhibit here, and I wrote out another one. It is my recollection that Mr. Martinelli wrote out what we call Plaintiff's Exhibit 2 while I was there, and that it was signed by Hall and Bartholomew while I was there. Plaintiff's Exhibit 3 was written out by me and signed by Mr. Bartholomew.

I instructed Hall not to pay over any money to Bartholomew, for the reason that he owed all the local merchants quite a bit [49] of money, and I was instructed by Judge Slack to protect those creditors by having Hall pay the money either to myself, or to one of the creditors, to be held for all of the creditors. Mr. Martinelli, I believe, asked Bartholomew if it would not be all right to have Hall pay the money over to me for the benefit of the creditors, and Bartholomew said that it would be all right, so then I made out this paper, Plaintiff's Exhibit 3. I did not get the \$2,800 at that time, because Hall said he did not have the money then, but that he would pay it on the following Wednesday. The \$2,800 was never paid to me.

There was a meeting of creditors at Point Reyes Station a short distance from Inverness, the next day, October 2d. A number of the principal creditors attended, including Mr. Gwynn, representing

(Testimony of L. C. Eastman.)

the Mercantile Trust Company, the Petaluma branch, Mr. Grandi, Mr. Martinelli, br. Scillachi, Mr. Bartholomew and Mr. Hall. The creditors said that I was to receive the money from Hall a few days later. One of the creditors said they thought it would be better for Mr. Gwynn to handle the money instead of myself, because Mr. Gwynn was the largest creditor, and it was agreed to by all the rest of the creditors that Mr. Gwynn should have it. Neither Bartholomew nor Hall made any objection to that.

Q. Was anything said about the value of the remaining property at that meeting, the value of the remaining property on the ranch which had been sold or agreed to be sold by Bartholomew to Hall for \$2,800, and if so, what was it?

Mr. HUNT.—That is objected to as immaterial, irrelevant and incompetent because it relates to a time when the transaction was completed and they were waiting for the money to be paid over. [50]

Mr. SLACK.—I think not, your Honor. All the parties were present on that occasion. I propose to show there was some question about the value of the equipment, in other words, whether Hall had paid too little or too much.

The COURT.—Objection sustained.

Mr. SLACK.—The purpose of that is to show that Mr. Hall had offered the creditors, if they were dissatisfied, to take the property off his hands at \$2,000 and that he would stand a loss of \$800.

(Testimony of L. C. Eastman.)

The COURT.—That would be a mere expression of opinion.

Mr. SLACK.—Very well, your Honor. You may take the witness.

Cross-examination.

At one time during my talk with Hall, I told him he must pay \$1,700 to get the lease. I told Hall that Judge Slack would give him the lease provided that he would pay to the Shafter Estate Company \$1,700, that that was on account of a little over \$1,400 that Bartholomew owed us for back rent. I think that is all the explanation I gave Hall. No consideration was required for the lease which I made with Bartholomew, which expired on October 1st.

On October 1st, in the morning, Hall and Bartholomew and I met at my house. The lease, which I had at my house at that time, was signed by Hall and he gave me a check for \$1,764.25. As they left my house, Hall and Bartholomew were discussing the price at which Bartholomew would sell to Hall the equipment that he, Bartholomew owned. Hall said that he would give Bartholomew what he was asking—I have forgotten just how he mentioned the price, or just what the price was. [51]

Q. Is it not a fact that what was said was this: Bartholomew was asking \$5,500 and Hall said he would not give more than \$4,500.

A. That may have been it.

(Testimony of L. C. Eastman.)

Q. To the best of your recollection, is not that what was said?

A. I don't remember anything about the \$6,500 and I could not say as to the \$4,500. I know that Mr. Hall would not give the price that Mr. Bartholomew was asking or what was discussed some time before.

WITNESS.—(Continuing.) I only attended the first meeting of the creditors on behalf of the Shafter Estate. At that meeting I may possibly have said that the defendant would have a claim for rent \$1,400, which would have to be paid *pro rata* out of the \$2,800. I am not positive that I said that. I have a faint recollection of saying it however. We did not make any claim to the creditors on this fund. I may have said that we had the power to make a claim, or indicated that we had the power to make a claim for \$1,400, if we wanted to, but I did not make any claim, or put in any claim for the \$1,400. I had no intention of putting in any claim. I don't know what Judge Slack's feeling was in the matter.

TESTIMONY OF WILLIAM T. HALL, FOR DEFENDANT.

WILLIAM T. HALL, called as a witness for the defendant testified as follows:

Direct Examination.

I am the tenant of the "N" Ranch, owned by the defendant, under a lease signed October 1, 1925, I

(Testimony of William T. Hall.)

formerly resided at Point Reyes Station, a few miles from Inverness. The first talk I had with Bartholomew about getting a tenant, or becoming a tenant of the "N" Ranch, was in the early part of September. He told me the ranch was for sale, and if I knew of a buyer to send one out. Soon afterwards I made an investigation to see [52] whether or not I could lease the property. In his first talk with me Bartholomew said the ranch was worth about \$6,500. When I thought about trying to get a lease on the ranch, I went out to look at the property. On that occasion, in my talk with Bartholomew, I asked him if I could buy him out by assuming a large part of his debts. He said he owed the bank, at Petaluma, \$3,000, or \$3,100, and the Grandi Company \$2,200. He mentioned no other debts on that occasion. We made a trip to Petaluma to the bank, and that seemed satisfactory. I would assume this large indebtedness of about \$5,300 and put up the small amount of cash that I had. I saw Mr. Gwynn, the manager of the bank in Petaluma, and it seemed to be satisfactory at that time. Bartholomew and I just talked over the proposition, and it seemed to be fair until I found out that there were other creditors to whom he owed a considerable amount of money. The deal just seemed to blow up then; there was nothing more about the \$6,500. I asked him to make a cash proposition and he said that he could not sell, that he could not make one. Later on I made another trip out there when I was told that he had to leave, and I asked him if

(Testimony of William T. Hall.)

we could not agree on a cash price somewhat cheaper. There was no agreement at all. He did not make a cash proposition to me.

Mr. Eastman told me not to pay any money to Bartholomew. I told Bartholomew that. After that conversation Bartholomew sold the best part of the hogs, and a Fairbanks scale, that I knew of, out of the property that was included in the equipment that he offered to me for \$6,500. I asked Mr. Eastman whether or not, if I agreed with Bartholomew to buy him out, I would be accepted by the company as a tenant. It seemed to be all right, but he spoke about referring the matter to Judge Slack. [53] I took the matter with Mr. Eastman again, in the latter part of September, 1925. About the terms of the lease, I offered \$2,200 a year, instead of the \$2,500 which Bartholomew had paid. Mr. Eastman told me that there was a claim of \$1,700 odd before the ranch would be leased again. He said I would have to pay it, or whoever took the ranch would have to pay this money in order to get a new lease. I knew that Bartholomew's lease was to expire on September 30, 1925. Mr. Eastman told me I could have the ranch on September 30th, on those terms if Bartholomew left.

I saw Bartholomew the next morning, after his lease had expired. I went out to his ranch and saw him there. It was understood that I was to have the ranch, and his lease had expired, and we were to go to Mr. Eastman to prepare for the sign-

(Testimony of William T. Hall.)

ing of a new lease. Bartholomew did not seem very much interested in how much he got—it was to go to the creditors. I told him that \$4,500 was as much as I would be willing to pay out on the deal. I knew I had to pay \$1,764.25 to the defendant to get the lease, and all I wanted to pay out on the deal was \$4,500; I told Bartholomew that I did not come to any understanding as to how much I was to pay before Bartholomew and I went to Eastman's residence that morning. While I was at the ranch, Bartholomew told me all he had to get was his suitcase. I signed the lease on October 1st, when Bartholomew and I went to Eastman's residence.

Up to the time when I signed the lease, I had reached no conclusion with Bartholomew as to whether or not I would take the remainder of his property, or what price I would pay for it. I recall a conversation with Bartholomew after the sale of the hogs and other property, at which he told me to *to* wait a couple of weeks and get the property cheaper. [54]

Q. I think you testified, Mr. Hall, that you and Bartholomew had some talk, either before or after the lease was signed on October 1st, about submitting the proposition of how much should be paid to Bartholomew if you bought the property. You did have such a talk with him, did you?

A. At the time of signing the lease we tried to agree and settle it right there but when we saw that we could not agree and it was time to take the

(Testimony of William T. Hall.)

lease we agreed that I sign the lease and square with the company and then if we could not agree we would appear before the creditors and sort of let the creditors decide the price that I should pay.

WITNESS.—(Continuing.) After my lease had been signed and Bartholomew had allowed his lease to expire, I knew that Bartholomew had no good-will to sell, and that there was nothing left for Bartholomew to sell except what remained of his personal property on the ranch.

I went with Bartholomew to Martinelli's store after I signed the lease and had handed the check over to Mr. Eastman. That check was payable to the order of the defendant for the amount specified as a consideration for the lease. I handed the lease in duplicate back to Mr. Eastman to be executed by the defendant. Perhaps a week or ten days later, I got from Mr. Eastman my copy of the lease executed by the defendant. It might have been earlier than that. I have with me my copy of the lease which I received from Mr. Eastman. It has been in my possession ever since Mr. Eastman gave it to me.

When I arrived at Martinelli's store, whih ise only a short distance from Mr. Eastman's residence, Bartholomew and I talked further about the personal property that was left on the ranch belonging to Bartholomew. The difference between \$4,500 and what I had to pay the defendant, \$1,764.25, amounted to \$2,700 odd, something less than \$2,800.

(Testimony of William T. Hall.)

Mr. Martinelli took [55] a hand in the discussion about that time. He asked me if I would not make it \$2,800, to make it round numbers. I told Mr. Martinelli that I would do so, and then he drew up the bill of sale. Mr. Eastman came in just as we were writing out the bill of sale.

Q. Was there any talk then at which you were present, between Bartholomew, Martinelli and Eastman as to who should take the \$2,800 which you agreed to pay for the property which was left on the ranch and agreed to be sold to you by Bartholomew.

A. It was agreed between all of us that Mr. Eastman would act as trustee.

WITNESS.—(Continuing.) That was satisfactory to everyone there. There was some suggestion that Martinelli should hold the \$2,800 as trustee, and Mr. Martinelli asked Mr. Eastman if he would not do it on account of Mr. Martinelli being a creditor. Bartholomew consented to that. I recall the writing out of the other paper Plaintiff's Exhibit 3. Bartholomew signed both papers in my presence and agreed to them.

I was present at the meeting of the creditors the next day at Point Reyes. Bartholomew and Eastman were also present.

Q. Do you recall any discussion among the creditors about the price which you agreed to pay for the property which was left on the ranch by Bartholomew and that Bartholomew agreed to sell you?

(Testimony of William T. Hall.)

A. They seemed to think the \$2,800 was not enough for the old equipment.

WITNESS.—(Continuing.) Mr. Eastman stated at the time that the goodwill had been lost and that Bartholomew had nothing but some personal property there, horses and so forth. [56]

I had not, up to that time, paid the \$2,800 to anybody. It was agreed at that meeting of the creditors that Mr. Gwynn, of the bank would take charge of the money. Neither Bartholomew nor I raised any objection to that. I accordingly secured the money and it was paid over to Gwynn.

Q. Mr. Hall, the \$1,764.25 came from your own

A. Yes, sir.

money, it was your own money, was it not?

Mr. SLACK.—You may cross-examine.

Mr. HUNT.—No questions.

TESTIMONY OF CHARLES W. SLACK, FOR DEFENDANT.

CHARLES W. SLACK, called as witness for the defendant, testified as follows:

Direct Examination.

I am an attorney at law, residing in San Francisco. I am the vice-president and general manager of the defendant company, and have been such since 1917. Before that time, I was attorney for the company and looked after its legal affairs. The execution of leases by the company is in my immediate charge.

(Testimony of Charles W. Slack.)

It has always been a custom of the company to make leases for the term of one year, and these have been renewed from time to time, if the tenants are satisfactory. The tenants have usually been satisfactory, and leases have been renewed from time to time. We have had some tenants there as long as 17 years; others, to my knowledge, have been there for 8 or 10 years. Where satisfactory, and tenants have desired to assign their leases, it has been the custom of the company never to interfere except to try to keep a check on the price for the goodwill not being excessive. We have accepted the tenants generally if they were satisfactory to us and to the outgoing tenants, and have permitted the two parties to make arrangements as to the price. We have had three instances during my management, including Bartholomew, where the tenants were not satisfactory. In the other two cases, we took over and operated the ranches ourselves at the termination of the tenancy, refusing to give the [57] tenants new leases. They were told that beforehand in each case. These other tenants, as in the case of Bartholomew were given ample opportunity, and considerable urging, to obtain satisfactory tenants in their stead; not having done so, we were obliged to make our own arrangements.

I had some acquaintance with Bartholomew about 1920, 1921, perhaps 1922, somewhere along there. Previous to the lease from October, 1924, to September 30, 1925, he had a lease of the same property, that is the ranch and the cattle then on the property,

(Testimony of Charles W. Slack.)

in conjunction with another tenant. There was a lease in 1922 to Bartholomew and a man by the name of Rainey. At the expiration of that lease, Rainey, so they told us, sold out to Bartholomew, and another lease was made to Bartholomew that lasted for another year, and then the lease in question about September, 1924, to Bartholomew again alone for another year.

The lease to Hall, dated October 1, 1925, was prepared by me. It was negotiated by Mr. Eastman, the superintendent of the properties. I fixed the amount of the consideration named in the lease on the basis of \$1,464.25, the back rent, which we have been unable to collect from Bartholomew, and the \$300 difference between that sum and the amount specified in the lease as a consideration, was due to the fact that the normal cash rent of the property was and had been for some time \$2500 a year. Hall, by reason of the run-down condition of the property and the loss—missing—of a whole herd of stock, besides other stock, refused to pay more than \$2,200. That established, for the time being and for some time in the future, the cash rent of \$2,200. Consequently, the difference for one year, to wit, \$300, was added on, by my insistence, to the cash consideration which Hall or anybody else would have to pay for getting the lease. [58]

In making these leases we always require the tenant to raise and deliver to us a minimum of heifer calves, or, at our option, bull calves, as specified in the lease. That is a part of our consideration, that

(Testimony of Charles W. Slack.)

they must deliver at the end of the year that number absolutely, the purpose of this being to maintain the herd of dairy cattle. In 1925, in the spring, there were, if I remember correctly, 23 yearling heifers leased to Bartholomew. They were yearlings which would become two year olds the following fall, that is, at about the expiration his lease. They disappeared absolutely, the whole herd, and that was one of the reasons for my dissatisfaction with Bartholomew. Other reasons were the neglect and loss of other cattle, our inability to get Bartholomew to make repairs, keep up the fences, keep up the road leading into his premises, and the general run-down condition of the property. As a result, the rest of the stock was in a poor condition, due to improper care, during the winter.

I first conversed with Bartholomew about getting off at the end of his term shortly after my return from the east. I was east on business twice during 1925, the first time from about March 10th to the latter part of April. I made two visits to the ranch properties, including that ranch, shortly after my return; one, according to memoranda which I have, on May 2d. I did not see Bartholomew, although I called at the "N" Ranch with Eastman to see him. He was not there. I visited the ranch again with Eastman on June 20th. There are seven ranches in that group. Our first objective point was the "N" Ranch. We met Bartholomew on the road on his way to Iverness. I told him that the ranch was in a bad condition, out of repair, stock in poor con-

(Testimony of Charles W. Slack.)

dition. I had seen them a month before. I told him that it was a singular thing, the missing of the whole herd of yearling heifers, that we could find no trace of them. We had searched for them. I don't know whether I told him at that time that we had searched for them. I told [59] him that he would have to look out for another tenant, that this thing could not go on, that he was behind in his rent and that he must sell out. Thereafter, on that same day, Mr. Eastman and I drove on to the ranch. I then ordered certain improvements to be made for the prospective new tenant, substantially as they have been described by Mr. Eastman in his testimony.

I went east again in September. I did not visit the ranch again, because we were engaged in a water hearing in Sacramento that took up our time. I went east on September 10th, to Washington, to attend a hearing before the Power Commission, and returned on September 28, 1925. I was first informed by Mr. Eastman with reference to the negotiations between Bartholomew and Hall on September 28th, immediately after my return, when I rang Eastman up on the telephone. I fixed, first, the amount of the back rent as the basis for a consideration of giving a lease to Hall or anybody else. Later on when Hall offered the \$2,200, then \$300 was added by me to the amount which was then fixed and known for Bartholomew's unpaid rent, making all told \$1,764.25. That was the price fixed

(Testimony of Charles W. Slack.)

for the obtaining of a lease by Hall or anybody else at that time.

I prepared this lease upon the receipt of advice from Mr. Eastman that Hall had agreed to it. I received that advice on September 30th, prepared the lease that day and sent it to Mr. Eastman, so that he would have it on the morning of October 1st. I would not have leased that property to anybody else at any lesser price.

My reason for instructing Mr. Eastman not to permit any money to be paid directly to Bartholomew, was, that I believed that if any money was paid to Bartholomew, the creditors would not receive a cent of it. Consequently, I made that as a condition to the purchase by anyone of what Bartholomew had to sell, that the money had to be paid to someone as a trustee for the creditors, or Bartholomew had to take his property off the ranch. I did not attempt to control any sale that he might make after he took the property off the ranch. [60]

That was not our affair, nor did I attempt to control the price which Hall was willing to pay and Bartholomew was willing to take for what he had left. That was no concern of ours, except that I hoped that it would be as good a price as possible.

I had known the Grandi Mercantile Company, Mr. Martinelli and Mr. Scillachi for many years. They deal with us and we deal with them. We had had satisfactory business arrangements with all of them. They are local merchants with whom we and our tenants have business, and it was my desire

(Testimony of Charles W. Slack.)
to protect them in any sale that I could possibly have anything to say about.

I never in any way consented to any holding over by Bartholomew after September 30, 1925. He was told to look out for another tenant. Mr. Eastman was told to help him all he could to get another tenant, and he knew perfectly well from what I have told him that he would have to quit after the 30th, because he could not get a new lease, and we would run the ranch ourselves if we could not get a new tenant.

There was no relationship existing between Bartholomew and the defendant, or any obligation, legal or moral, from the defendant to Bartholomew, after midnight on September 30, 1925. We considered that Mr. Bartholomew by his conduct, had forfeited all consideration that we might otherwise show him. There was nothing coming to him from the O. L. Shafter Estate Company that he could sell. The goodwill was gone when his lease expired. He could have sold the goodwill before that if he and Hall had agreed on the price.

I was familiar, in a general way, with the property that was on the ranch. It would have a great deal more value on the ranch than if removed therefrom. I should say that 50 per cent of the value was in the retention of the property on the ranch, as against the removal of the property from the ranch. The property outside the livestock, the horses and the hogs, would have practically no value, nor more than 50 per cent, off the ranch.

(Testimony of Charles W. Slack.)

[61] It had a value in place because the tenant could come in and use it there, and therefore it had a larger value in place than it would have off the ranch.

I was advised of the conclusion of the negotiations between Eastman and Hall on September 30th. The lease was accordingly prepared, as produced here, with one small exception, and was sent to Mr. Eastman, and is the lease which was executed here with a change, that we discovered had to be made later on, in the number of some cattle. That is indicated upon one of the originals, changing *the* of yearlings from 22 to 26. On October 1st, I was advised by Mr. Eastman by telephone that the lease had been signed that morning. Thereafter, the lease executed in duplicate by Hall was sent to me and was executed by me for the company, and Hall's copy was returned to him and the other retained by me for my files.

Cross-examination.

We never, in any other instance, exacted any cash consideration for a lease, because a case of this kind never arose before. The rent had always been paid, even in the other two cases I have mentioned, where tenants were told that when their lease expired, they could not have a renewal. The schedules in bankruptcy show that the debts of Bartholomew, including our own claim, amounted to about \$9,000.

(Testimony of Charles W. Slack.)

After October 1st, I talked to a number of the principal creditors at Inverness and several of those at Petaluma about the position of the defendant and its rent claim against Bartholomew. I said to those to whom I talked, there were threats of bankruptcy proceedings at that time—and I said that, after all the trouble we had been put to to save the \$2,800 for the creditors, if they, through proceedings in bankruptcy, put uh to any trouble and expense we would reserve the right to file a claim in bankruptcy. Up to that time, before I heard of the bankruptcy [62] proceedings, it was my individual intention to waive the claim of the company for back rent and let the other creditors have the benefit of the money, but, since they were using the \$2,800 for the purpose of trying to get more money from us, we would reserve the right to put in the claim of the defendant against the assets.

Thereupon the defendant rested.

TESTIMONY OF WILLIAM BARTHOLOMEW,
FOR PLAINTIFF (RECALLED IN RE-
BUTTAL).

WILLIAM BARTHOLOMEW, recalled as a witness for the plaintiff in rebuttal, testified as follows:

Direct Examination.

On the morning of October 1st, in the conversation between Hall and Eastman and myself, at Eastman's residence, Eastman said the \$300 was for the calves that were supposed to be lost. There were

(Testimony of William Bartholomew.)

20 head of calves lost during the 1924 storm upon the hill and they were found dead by hunters up there on the hill. The company charged Hall up with \$300 for those calves.

Cross-examination.

I made some search for those missing cattle and I told Judge Slack that I could not find them living or dead. Afterwards, I did find some of them dead before I left the ranch. I never told Judge Slack that I found them dead. I never saw him. I never saw him for a month or so. Mr. Kehoe was after the cattle a whole week and he could not find them living or dead. I afterwards found some of them dead. Myself and some of the hunters up on the ranch found some of the cattle dead in the brush. One hunter told me that he saw several cattle lying in the brush dead.

Thereupon the cause was argued to the Court by counsel.

The COURT.—I think the evidence clearly shows that there was no intentional wrong on the part of the defendant, but that the effect of the transfer was to create the preference and thus causing a diminution of the bankrupt's estate. The testimony of Mr. Bartholomew shows he agreed to sell to Mr. Hall for [63] \$6,500.00 That was before October 1st, 1925. Bartholomew said Hall told him that he went to see Mr. Eastman and that Mr. Eastman told him not to pay any money to him, Bartholomew. Shortly thereafter Hall offers Bartholo-

mew only \$4,500.00. Bartholomew says that Mr. Eastman said that before anyone could take over the ranch he had to pay the \$300.00 for the calves, lost or stolen, and the sum of \$1,400.00 back rent. He further stated that Mr. Eastman said that he, Bartholomew, had better sell to Mr. Hall for the \$4,500.00. Mr. Eastman does not deny that. As a matter of fact, he says in his testimony in substance, that he did tell Hall not to pay Bartholomew any money, that he was in debt; he says that he advised Bartholomew to come to the best terms possible. Mr. Hall says that Mr. Eastman told him that he would have to pay back rent before he could get the lease. Mr. Hall further stated, if I remember correctly, that he told Mr. Bartholomew that \$4,500.00 was all he would pay on the deal. Considering all the facts, I think plaintiff is entitled to judgment.

Mr. ZOOK.—May I ask if your Honor finds that the \$300.00 was Mr. Bartholomew's money?

The COURT.—Whose money was it if it was not his?

Thereupon on motion of the defendant, and the plaintiff consenting thereto, it was agreed that findings be prepared by the parties and submitted to the Court.

Thereafter, and on September 10, 1926, the defendant formally moved that the Court enter judgment in favor of the defendant upon the following grounds:

1. That no evidence sufficient to warrant a judgment in favor of the plaintiff has been introduced upon the trial.

2. That the evidence shows without contradiction: [64]

(a) That neither the bankrupt Bartholomew, nor anyone acting for or on his behalf, or at his direction, transferred to the defendant at any time any property of the bankrupt.

(b) That the money paid by the witness Hall to the defendant was the sole and exclusive property of Hall, and that the bankrupt had no right, title or interest therein.

(c) That the estate of the bankrupt was in no wise diminished by the payment by Hall to the defendant.

(d) That the payment by Hall to the defendant in no manner effected a preference in favor of the defendant.

(e) That the payment by Hall to the defendant did not operate, nor was it intended by either Hall or defendant, to operate as a discharge of any obligation of the bankrupt to the defendant.

Thereupon, the Court denied the said motion, to which ruling the defendant then and there duly excepted.

EXCEPTION No. 1.

The plaintiff thereafter submitted to the Court his proposed findings of fact and conclusions of law, in the form subsequently signed by the Court and incorporated in the judgment-roll herein. The defendant, within the time allowed by law, served on the plaintiff and presented to the Court its proposed amendments to the said proposed findings of fact and conclusions of law, and thereafter the

Court rejected each and all of the said proposed amendments, and signed and entered the said findings of fact and conclusions of law now incorporated in the said judgment-roll, and ordered judgment entered thereon.

To the rejection of the said proposed amendments, and of each of them, the defendant then and there duly excepted. [65]

EXCEPTION No. 2.

The said proposed amendments to the said proposed findings of fact and conclusions of law are in the words and figures following, to wit:

(Title of Court and Cause.)

PROPOSED AMENDMENTS TO FINDINGS.

The above-named defendant proposes the following amendments to the findings of fact and conclusions of law proposed by the plaintiff in the above-entitled action:

1. That proposed findings III be amended by striking therefrom the following clause: "Except in so far as the debt of defendant was satisfied as hereinafter mentioned."

2. That proposed findings IV, V and VI be stricken out and that the following finding be made in lieu thereof:

"IV.

That the bankrupt at no time transferred to the defendant, any sum of money whatsoever out of the property of the bankrupt or otherwise; that the

payment by the witness Hall to the defendant of the sum of \$1,764.25 on the 1st day of October, 1925, was made by the said Hall out of funds belonging solely and exclusively to the said Hall, in which the bank rupt had no right, title or interest, and that the estate of the bankrupt was in no manner diminished by the said payment; and that the said payment did not operate, nor was it intended by either Hall or the defendant to operate, as a discharge of any obligation of the bankrupt to the defendant."

4. That the proposed conclusions of law be stricken out, and that the following conclusions of law be made in lieu thereof:

"CONCLUSIONS OF LAW.

The plaintiff is not entitled to recover any judgment against the defendant, and the defendant is entitled to judgment for its costs herein."

September 10, 1926.

Respectfully submitted,
CHARLES W. SLACK and
EDGAR T. ZOOK,
Attorneys for Defendant. [66]

To the signing and entry of the said findings of fact and conclusions of law, the defendant then and there duly excepted.

EXCEPTION No. 3.

And to the entry of judgment in favor of the plaintiff, the defendant then and there duly excepted.

EXCEPTION No. 4.

ASSIGNMENTS OF ERROR.

The defendant now assigns as error to be used upon its writ of error to the said judgment herein, the following, to wit:

ERRORS OF LAW.

1. That the Court erred in denying the motion of the defendant for judgment in its favor, as specified in Exception No. 1.
2. That the Court erred in rejecting the proposed amendments, and each of them, to the proposed findings of fact and conclusions of law of the plaintiff, as specified in Exception No. 2.
3. That the Court erred in signing and entering its said findings of fact and conclusions of law, as specified in Exception No. 3.
4. That the Court erred in entering judgment in favor of the plaintiff, as specified in Exception No. 4.

And now, within the time allowed by law, the defendant presents this, its bill of exceptions, to be used upon writ of error to the said judgment.

Dated, October 5th, 1926.

CHARLES W. SLACK and
EDGAR T. ZOOK,
Attorneys for Defendant. [67]

STIPULATION.

It is hereby stipulated and agreed between the parties to the above-entitled action, by their respective attorneys, that the foregoing bill of exceptions is true and correct, and may be settled, certi-

fied and allowed by the Court, without further engrossment or service thereof upon the attorney for the plaintiff.

Dated, October 5th, 1926.

REUBEN G. HUNT,

Attorney for Plaintiff.

CHARLES W. SLACK and

EDGAR T. ZOOK,

Attorneys for Defendant.

CERTIFICATE OF THE COURT TO BILL OF EXCEPTIONS.

The foregoing bill of exceptions is hereby settled and allowed and certified to be a true bill of exceptions.

Dated, October 5th, 1926.

WM. H. SAWTELLE,

Judge.

[Endorsed]: Filed October 19th, 1926. [68]

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

O. L. Shafter Estate Company, the defendant in the above-entitled action, in connection with its petition for a writ of error, makes the following assignment of errors, which, it avers, occurred upon the trial of the cause, to wit:

1. The Court erred in denying the motion of this defendant that the Court enter judgment in its favor.

2. The Court erred in rejecting the amendments, and each of them, proposed by this defendant to the proposed findings of fact and conclusions of law submitted by the plaintiff herein.

3. The Court erred in signing and entering its findings of fact and conclusions of law in favor of the plaintiff herein.

4. The Court erred in entering judgment in favor of the plaintiff herein.

WHEREFORE, This defendant prays that the judgment of the District Court may be reversed.

CHARLES W. SLACK and

EDGAR T. ZOOK,

Attorneys for Defendant.

[Endorsed] : Filed Oct. 20, 1926. [70]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD
ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing 76 pages, numbered from 1 to 76 inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error as the same remains on file and of record in the above-entitled case in the office of the Clerk of said Court, and that the same constitutes the return to the annexed writ of error.

I further certify that the costs for the foregoing return to the writ of error is \$31.20, that said amount was paid by the defendant and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said District Court this 3d day of December, 1926.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States for
the Northern District of California. [77]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America
to the Honorable, the Judges of the District
Court of the United States for the Northern
District of California, Southern Division,
GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between O. L. Shafter Estate Company, a Corporation, plaintiff in error, and W. T. Mooney, Trustee in Bankruptcy of the Estate of William Bartholomew, defendant in error, a manifest error hath happened, to the great damage of the said O. L. Shafter Estate Company, plaintiff in error, as by plaintiff's complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy jus-

tice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WM. HOWARD TAFT, Chief Justice of the United States, the — day of October, in the year of our Lord one thousand nine hundred and twenty-six.

[Seal] WALTER B. MALING,
Clerk of the United States District Court for the
Northern District of California, Southern Di-
vision.

By A. C. Aurich,
Deputy Clerk.

Allowed by

FRANK KERRIGAN,
District Judge. [78]

[Endorsed]: Filed Oct. 20, 1926.

RETURN TO WRIT OF ERROR.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States
for the Northern District of California [79]

[Endorsed]: No. 5019. United States Circuit Court of Appeals for the Ninth Circuit. O. L. Shafter Estate Company, a Corporation, Plaintiff in Error, vs. W. T. Mooney, Trustee in Bankruptcy of the Estate of William Bartholomew, Bankrupt, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed December 4, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Court of Appeals for the
Ninth Circuit.

No. 5019.

O. L. SHAFTER ESTATE COMPANY, a Cor-
poration,

Plaintiff in Error,
vs.

W. T. MOONEY, Trustee in Bankruptcy of the
Estate of WILLIAM BARTHOLOMEW,
Defendant in Error.

STIPULATION AS TO PRINTING OF TRAN-
SCRIPT.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective attorneys, that the following papers, appearing in the typewritten record herein, are in proper form, and were filed, issued or made in due time, and that the same may be omitted from the printed record herein, namely:

1. The subpoena ad respondendum;
2. Order transferring cause;
3. Certificate of Court to judgment-roll;
4. Petition for writ of error;
5. Order allowing writ of error and fixing amount of supersedeas bond;
6. Bond on writ of error;
7. Praeclipe for record; and
8. Citation on writ of error.

IT IS FURTHER STIPULATED AND AGREED between the parties hereto that the covenants numbered 1 to 12 in the lease, Defendant's Exhibit "A," appearing on page 36 et seq., of the typewritten record, are substantially in the form of [81] those contained in Plaintiff's Exhibit 1, appearing on page 18 et seq., of the said typewritten record, and that in the preparation of the said printed record herein paragraphs Nos. 1 to 12 of the said Defendant's Exhibit "A" may be omitted.

IT IS FURTHER AGREED that this stipulation shall be incorporated in the said printed record.

Dated this 6th day of December, 1926.

CHARLES W. SLACK and
EDGAR T. ZOOK,

Attorneys for Plaintiff in Error.

REUBEN G. HUNT,

Attorney for Defendant in Error. [82]

[Endorsed]: No. 5019. In the United States Court of Appeals for the Ninth Circuit. O. L. Shafter Estate Company, a Corporation, Plaintiff in Error, vs. W. T. Mooney, Trustee in Bankruptcy of the Estate of William Bartholomew, Defendant in Error. Stipulation as to Printing of Transcript. Filed Dec. 8, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 5019

IN THE
**United States Circuit Court
of Appeals** 2
FOR THE
NINTH CIRCUIT

O. L. SHAFTER ESTATE COMPANY, a Corporation,

Plaintiff in Error,

vs.

W. T. MOONEY, Trustee in Bankruptcy of
the Estate of WILLIAM BARTHOLOMEW,
Bankrupt,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

FILED

FEB 7 1917

F. A. WASHINGTON

EDGAR T. ZOOK,

For Charles W. Slack and Edgar T. Zook,
Attorneys for Defendant.

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No. 5019

IN THE
United States Circuit Court
of Appeals
FOR THE
NINTH CIRCUIT

O. L. SHAFTER ESTATE COMPANY, a Corporation,

Plaintiff in Error,

vs.

W. T. MOONEY, Trustee in Bankruptcy of
the Estate of WILLIAM BARTHOLOMEW,
Bankrupt,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the District Court for the Northern District of California in an action brought by W. T. Mooney, as trustee in bankruptcy of the estate of

William Bartholomew, against O. L. Shafter Estate Company, a corporation, to recover the sum of \$1764.25, alleged by the trustee to have been paid to the corporation by the bankrupt at a time when he was insolvent, and therefore claimed by the trustee to constitute a voidable preference. The insolvency of the bankrupt at the time of the transaction complained of was conceded, but the defendant contended that no money whatever was paid to the defendant by the bankrupt, that the sum was paid by a third person from his own funds, that the estate of the bankrupt was in no wise diminished by the payment, that the interest of no creditor of the bankrupt was affected by the transaction, and that therefore the transaction was in no sense a voidable preference.

The cause was tried before the Honorable William H. Sawtelle, sitting without a jury, a jury trial having been waived by written stipulation of the parties (Tr. p. 6), and judgment was rendered for the plaintiff as prayed (p. 12) on findings of the Court (p. 9). A formal motion for judgment was duly made by the defendant (p. 64), and proposed amendments to the proposed findings were duly offered by the defendant (p. 66), in all of which the position of the defendant, that the evidence was not only insufficient to warrant a judgment but, on the contrary, negatived any possible preference, was clearly stated. Exceptions were duly taken to the denial of the motion for judgment (p. 65), to the rejection of the proposed amendments to the findings (p. 66), to the signing and entry of the findings (p. 67), and to the entry of judgment for the plaintiff (pp. 67, 68).

Assignments of error covering the matters excepted to were duly filed (p. 68), and the question of the sufficiency of the evidence to support the judgment, raised in the various steps above referred to, is now properly before this Court.

By stipulation of the parties (p. 74), certain of the papers appearing in the typewritten record were omitted from the printed transcript, although conceded to be in proper form and to have been filed in due time. It was further stipulated that certain provisions of a certain lease from the corporation to one Hall, introduced in evidence as Defendant's Exhibit A (pp. 37 et seq.), were substantially in the form embodied in the lease from the corporation to Bartholomew (Plaintiff's Exhibit 1, pp. 14 et seq.), and these provisions were accordingly omitted from the printed transcript (p. 39).

For the sake of brevity, the parties will be herein-after referred to as the plaintiff and the defendant, as in the lower Court, although their designations are reversed on this writ of error.

There is very little conflict in the evidence introduced on the trial. While the bankrupt Bartholomew was decidedly hostile to the defendant, and endeavored to place his own conduct in the most favorable light, the testimony on all of the essential points in the case stands uncontradicted, and, as we shall show in our argument, is not only insufficient to establish a preferential payment, but actually negatives the claim of any preference.

The defendant corporation is the owner of certain dairying properties in the County of Marin, State of California, which are subdivided into various ranches,

the one particularly referred to in the case at bar being known as the "N" Ranch. Since 1917, the legal affairs of the defendant and the preparation and execution of leases on its behalf have been in the charge of Charles W. Slack, who is the vice-president and general manager of the defendant (p. 54). L. C. Eastman, of Inverness, is the ranch Superintendent for the defendant (p. 37). The defendant has always leased its lands for one year terms, the leases being renewed from time to time if the tenants are satisfactory. When satisfactory, the tenants have been permitted to sell out to other parties satisfactory to the defendant, its policy being not to interfere except to try to keep the outgoing tenant from charging the incoming tenant too much for the good-will of the business (p. 55). It is to be noted that the leases of the defendant provide that they are not assignable without the consent of the defendant, and that the so-called "good-will" arose purely from the custom of the defendant to renew leases for satisfactory tenants, and from the fact that the machinery, equipment and horses on a ranch, which would presumably be suitable for the conduct of operations thereon, would naturally have a greater value in place than if removed, as Judge Slack testified (pp. 60-61). Furthermore, the new tenant in purchasing the property in place would be saved the trouble and delay incidental to the purchase of new equipment.

Bartholomew, the bankrupt, first had a lease of the "N" Ranch, together with the cattle thereon, in 1922, in conjunction with another tenant. In 1923, a new lease was made to him alone, his associate having sold

out, and, again in 1924, a second lease was made to him (pp. 55-6). This lease, which was offered in evidence as Plaintiff's Exhibit A (pp. 14 et seq.), was for the term of one year commencing October 1, 1924, and ending September 30, 1925, and provided for a cash rental of \$2500, payable in installments, in addition to 26 of the calves to be selected by the defendant from those born in the season of 1924-5. The cattle which were leased with the ranch comprised 108 cows, 24 two-year-old heifers and 23 yearling heifers. In the spring of 1925, the yearling heifers, 23 in all, mysteriously disappeared, and while Bartholomew claimed that they were lost in a storm and found dead (p. 63), he admitted that he never told Judge Slack that they had been found dead (id.). Eastman made a search for the cattle, but could not find them, and in June, 1925, when Judge Slack spoke to Bartholomew, in the presence of Eastman, about their loss, Bartholomew merely said that they had disappeared and could not be found (p. 41). The disappearance of these heifers, together with Bartholomew's neglect of the cattle otherwise and his failure to make repairs and keep up the property and the non-payment of his rent, caused Judge Slack to become thoroughly dissatisfied with him, and on June 20, 1925, Judge Slack told him that he would have to look for a new tenant (pp. 57-8; p. 41). Bartholomew said that he would do so, and asked Eastman to try and find a new tenant for him (p. 41).

Early in September, 1925, Bartholomew had a talk with one William T. Hall, in which Bartholomew asked Hall to find him a tenant. Soon thereafter, Hall decided

to investigate the property with a view to leasing it himself, and went out to the ranch to look it over. Bartholomew said the ranch was worth \$6500, and Hall suggested that he, Hall, might assume Bartholomew's debts amounting to about \$5300, and pay the balance in cash. Bartholomew and Hall then went to a bank at Petaluma, to which Bartholomew was indebted, and discussed the matter with the manager (p. 49). Then, according to Hall, he found out that Bartholomew owed a considerable amount of money to other creditors, and the deal "just seemed to blow up" (id.). Bartholomew's version is slightly different. He testified that Hall agreed to buy the ranch for \$6500, that he and Hall went to Petaluma to see about Hall raising the money, that the arrangements were all made, but that when he asked Hall for a deposit, Hall refused to make it, saying that Eastman had told him, Hall, not to pay Bartholomew any money (p. 25). Bartholomew then told Hall he would not sell the place (id.), and proceeded to sell some hogs and "some stuff off the ranch" (p. 26), including a set of Fairbanks scales (p. 34). On cross-examination, Bartholomew again stated (p. 33) that the deal for \$6500 fell through because Hall would not pay him a deposit.

Meanwhile, Hall had spoken with Eastman, with reference to his acceptability as a tenant, in the event that he should buy Bartholomew out (p. 50). Eastman seemed to think Hall would be acceptable, but stated that he would have to refer the matter to Judge Slack. About the end of September, Hall again took the matter up with Eastman and offered \$2200 rent, instead

of the \$2500 which was provided in the Bartholomew lease. Eastman then told Hall that there was a claim of \$1700 odd which would have to be paid before the ranch would be leased again, and that whoever took the ranch would have to pay this amount in order to get a new lease (*id.*). Judge Slack had been out of the State, and, on his return, Eastman had taken up with him the matter of a new lease to Hall. Judge Slack first told Eastman that the amount based on the rent owed by Bartholomew would have to be paid by Hall or anyone else who might take the lease. Later, when Hall offered only \$2200 cash rent, instead of \$2500, Judge Slack added the \$300 difference in rent to the amount first arrived at, making a total of \$1764.25 to be paid by the new tenant (p. 58).

On September 30th, Hall agreed with Eastman to take the lease on this basis, and Eastman so advised Judge Slack, who prepared a lease to Hall that day, and mailed it to Eastman (p. 59). On the night of September 30th, Eastman saw Bartholomew, asked him if he had come to any agreement with Hall, and, when informed by Bartholomew that no agreement had been reached, advised Bartholomew to see Hall that night, while he still was in possession of the ranch, and to come to the best terms possible (p. 43). Bartholomew did not see Hall that night, but the next morning, October 1st, after Bartholomew's lease had expired, Hall went out to the ranch to take an inventory of the property and see what he could offer Bartholomew for the property. Bartholomew's first testimony as to any amount offered by Hall was that Hall said, "All I can

give you is \$4500 for the ranch and for the stuff." (p. 26.) On cross-examination, he quoted Hall as saying, "All the money I can raise is \$4500." (p. 34.) Hall's testimony was as follows (p. 51):

"I told him that \$4500 was as much as I would be willing to pay out on the deal. I knew I had to pay \$1764.25 to the defendant to get the lease, and all I wanted to pay out on the deal was \$4500; I told Bartholomew that; I did not come to any understanding as to how much I was to pay before Bartholomew and I went to Eastman's residence that morning."

Bartholomew was fully advised of the conditions imposed by the defendant for a new lease, although he was mistaken as to the reason for the \$300 payment, for he testified (p. 30):

"Mr. Eastman told Mr. Hall, and of course I knew myself, that before any one could take over the ranch they had to pay that back rent of mine and that \$300 for calves which they say that I either lost or stole."

No agreement on the sale was reached at the ranch, and Bartholomew went to Inverness and there consulted some of his creditors. He met Hall later at Eastman's residence, where Hall signed the lease, Defendant's Exhibit A, in duplicate and gave Eastman his check for \$1764.25. No agreement was reached between Hall and Bartholomew at Eastman's residence as to the price Hall was to pay Bartholomew for the equipment. As Eastman testified, (p. 44),

"On that occasion, at my residence, Hall and Bartholomew left my house to discuss the selling

price further. They were discussing it as they left the house and went over towards Martinelli's store."

Hall testified (pp. 51-3) :

"Up to the time when I signed the lease, I had reached no conclusion with Bartholomew as to whether or not I would take the remainder of his property, or what price I would pay for it. I recall a conversation with Bartholomew after the sale of the hogs and other property, at which he told me to wait a couple of weeks and get the property cheaper.

"Q. I think you testified, Mr. Hall, that you and Bartholomew had some talk, either before or after the lease was signed on October 1st, about submitting the proposition of how much should be paid to Bartholomew if you bought the property. You did have such a talk with him, did you?

"A. At the time of signing the lease we tried to agree and settle it right there but when we saw that we could not agree and it was time to take the lease we agreed that I sign the lease and square with the company and then if we could not agree we would appear before the creditors and sort of let the creditors decide the price that I should pay.

"Witness—(Continuing.) After my lease had been signed and Bartholomew had allowed his lease to expire, I knew that Bartholomew had no good will to sell, and that there was nothing left for Bartholomew to sell except what remained of his personal property on the ranch.

"I went with Bartholomew to Martinelli's store after I signed the lease and had handed the check over to Mr. Eastman. That check was payable to the order of the defendant for the amount specified as a consideration for the lease. I handed the lease in duplicate back to Mr. Eastman to be executed by the defendant. Perhaps a week or ten days later, I got from Mr. Eastman my copy of the lease executed by the defendant. It might have been earlier than

that. I have with me my copy of the lease which I received from Mr. Eastman. It has been in my possession ever since Mr. Eastman gave it to me.

"When I arrived at Martinelli's store, which is only a short distance from Mr. Eastman's residence, Bartholomew and I talked further about the personal property that was left on the ranch belonging to Bartholomew. The difference between \$4500 and what I had to pay the defendant, \$1764.25, amounted to \$2700 odd, something less than \$2800.

"Mr. Martinelli took a hand in the discussion about that time. He asked me if I would not make it \$2800, to make it round numbers. I told Mr. Martinelli that I would do so, and then he drew up the bill of sale. Mr. Eastman came in just as we were writing out the bill of sale."

Bartholomew's testimony is substantially the same (pp. 26-7) :

"I went down that morning to Inverness, and I met Mr. Hall and Mr. Eastman down there. Mr. Eastman asked me to go up to his house with Mr. Hall. We went up there. Mr. Hall asked me if I wanted to give him the place for the money. I told him he might as well have it, I guess, or something like that, so Mr. Hall wrote out Mr. Eastman a check for some money. I did not see what it was. We went over to Mr. Martinelli's store and fixed everything in his store for \$4500. After the \$1700 was paid by Mr. Eastman, there was \$2760 left or something like that. Mr. Martinelli and I asked Mr. Hall if he would not make it out for \$2800 even money. There was \$1400 and some dollars for the rent and \$300 for calves which were lost in the 1923 storm, and so he said he would make it for the \$2800 even money. I did not see the check Mr. Hall gave Mr. Eastman, but it was supposed to be seventeen hundred and some dollars. In that conversation, they were to get \$1400 back rent which I owed and \$300 for the calves before Mr. Hall could get the

lease. That was said in the conversation between Hall and Eastman and myself on that occasion. There were some papers made out between Mr. Hall and myself at Mr. Martinelli's store."

Martinelli's testimony as to the price which was finally agreed upon, is to the same effect (p. 36) :

"Before I drew up the papers they themselves had a difference of a few dollars between 1700 and some odd, and so I told them to make it \$2800 even. I suggested to Hall to make it \$2800 and make it an even sum."

Judge Slack, knowing that Bartholomew owed a large amount of money, had instructed Eastman not to permit any money to be paid directly to Bartholomew, because he believed that if any money was so paid, "the creditors would not receive a cent of it." (p. 59.) He therefore made it a condition that if any sale of the property were to be made on the ranch, the money was to be paid to someone as a trustee for the creditors; otherwise, Bartholomew had to take his property off the ranch. He did not undertake, however, to exercise any control of any sale that Bartholomew might make if the property were first removed from the ranch (id.). Judge Slack desired to protect the creditors, with many of whom the defendant had satisfactory business relations, in any sale about which he could possibly have anything to say. (pp. 59-60.) Eastman had advised Hall accordingly (pp. 43, 45), and Bartholomew knew of this condition imposed by Judge Slack (pp. 25, 33). This was the reason for Bartholomew's visit to some of his creditors on the morning of October 1st (p. 26). Accordingly, following the signing of the agreement of

sale, Bartholomew executed a document (plaintiff's Exhibit 3, pp. 28-9) appointing Eastman as trustee for the purpose of paying to the creditors the \$2800 which was agreed upon. Hall did not have the money at the time, and the money was never paid to Eastman. At a meeting of creditors a few days later, it was suggested that Mr. Gwynn of the bank at Petaluma, the largest creditor, should take the money (pp. 45-6), and Hall subsequently paid it to Gwynn (p. 54).

The record is silent as to the actual value of the property on the ranch, for which Hall paid Gwynn, as trustee, the sum of \$2800. The plaintiff made no effort to prove the value of the property. The defendant's offer to prove that Hall had offered to turn the property over to the creditors for \$2000 and to take a loss of \$800 on it, was promptly met by an objection from counsel for the plaintiff, which was sustained (pp. 46-7). The omission of the plaintiff to prove the value of the property is most significant, as, if the property had been worth more than \$2800, there might have been some moral ground of complaint against the defendant, although, as we shall show in our argument, even then there would have been no legal liability on its part.

ARGUMENT.

Before discussing the questions of law involved in the case, we desire to call to the Court's attention the fact that the lower Court did not have the facts clearly in mind when it rendered its oral decision, which appears on pages 63 and 64 of the transcript. In substantiation of this statement, we will quote the oral decision *in extenso*, interpolating our comments thereon in *italics*.

"I think the evidence clearly shows that there was no intentional wrong on the part of the defendant, but that the effect of the transfer was to create the preference, and thus causing a diminution of the bankrupt's estate. The testimony of Mr. Bartholomew shows he agreed to sell to Mr. Hall for \$6500. That was before October 1, 1925. Bartholomew said Hall told him that he went to see Mr. Eastman and that Mr. Eastman told him not to pay any money to him Bartholomew."

While this statement ignores Hall's testimony that the reason he did not buy the place at \$6500 was because Hall found out that Bartholomew had a lot of debts other than those Hall was willing to assume as part of the purchase price, it may be that there is some evidence to support the statement, although the fact that Bartholomew, when he took the stand in rebuttal, did not touch on Hall's testimony on this point, is significant.

"Shortly thereafter Hall offered Bartholomew only \$4500."

Bartholomew himself testified (p. 34) that "the first talk about \$4500 was on the morning after my lease was

up," and quoted Hall as saying "All the money I can raise is \$4500" (id.). This being Bartholomew's last statement as to what Hall said about \$4500, it must be taken as a correction of his earlier statement (p. 26) that Hall said "All I can give you is \$4500 for the ranch and the stuff." Furthermore, Bartholomew knew that Hall did not intend to pay him \$4500, for, to use Bartholomew's own language (p. 30)—"At the meeting with Mr. Eastman and Mr. Hall when Mr. Hall turned over to Mr. Eastman a check, I thought that check was for the \$1700. Mr. Eastman told Mr. Hall, and of course I knew myself, that before anyone could take over the ranch they had to pay that back rent of mine and that \$300 for calves which they say that I either lost or stole."

"Bartholomew says that Mr. Eastman said that before anyone could take over the ranch he had to pay the \$300 for the calves, lost or stolen, and the sum of \$1400 back rent."

Barring the question of the veracity of Bartholomew's statement as to the purpose of the \$300 payment, and the inaccuracy of the amount of rent, which Bartholomew himself testified (p. 25) was "\$1400 odd" and again (p. 27) "\$1400 and some dollars," we may accept this statement of the Court as nearly correct.

"He further stated that Mr. Eastman said that he, Bartholomew, had better sell to Mr. Hall for the \$4500. Mr. Eastman does not deny that."

The Court was clearly wrong here. According to both Bartholomew (pp. 34-5) and Eastman (p. 43), Eastman's advice to sell was given to Bartholomew on the

*night of September 30th, before the amount of \$4500 had even been mentioned. Bartholomew's testimony does not contain a single word about Eastman advising him to sell for any particular sum, and his testimony with respect to the conversation at Eastman's house on the morning of October 1st contains no reference to any advice by Eastman on that occasion. The only conversation between Eastman and Bartholomew that morning which appears in the record is the testimony of Eastman (p. 44) that he asked Bartholomew whether he was ready to leave and Bartholomew's reply in the affirmative. So far as the price was concerned, according to Eastman (*id.*), Hall and Bartholomew were still discussing it when they left his house. This is corroborated by Bartholomew's statement (p. 27) that "we went over to Mr. Martinelli's store and fixed everything in his store for \$4500;" and the price of \$2800 was fixed after Martinelli and Bartholomew had asked Hall to make it "\$2800 even money."*

"As a matter of fact, he (Eastman) says in his testimony in substance that he did tell Hall not to pay Bartholomew any money, that he was in debt; he says that he advised Bartholomew to come to the best terms possible. Mr. Hall says that Mr. Eastman told him that he would have to pay back rent before he could get the lease. Mr. Hall further stated, if I remember correctly, that he told Bartholomew that \$4500 was all he would pay on the deal."

These statements of the Court are correct, but they necessarily negative the notion that Hall agreed to pay Bartholomew \$4500, and they certainly do not warrant

the concluding remarks of the Court that "considering all the facts, I think plaintiff is entitled to judgment."

We appreciate the finding of the lower Court that "there was no intentional wrong on the part of the defendant," but we regret the fact that the Court did not examine the authorities submitted by us on the argument before rendering its decision. In view of the fact that Judge Slack had protected the creditors to the extent of requiring that no money should be paid to Bartholomew for any sale which might take place of property on the defendant's ranch, the Court might have assumed that Judge Slack, in his dual capacity of general manager and attorney for the defendant, possibly had good authority for his actions on behalf of the defendant, that he was neither intentionally nor unintentionally taking any advantage of, or obtaining any preference over, the creditors of Bartholomew, and that he was not proceeding without an exact appreciation of the rights and duties of the defendant.

The defendant's position, at the time of the transactions in question was, and ever since has been, as follows:

1. As the owner of the ranch, the defendant had the right to impose any condition it might see fit upon a new tenant as a prerequisite to granting him a lease.
2. The money that the defendant received was never part of the bankrupt's estate, but was the sole and exclusive property of Hall.

3. The payment by Hall to the defendant, while it may have reduced the amount which Hall might otherwise have been willing to pay to Bartholomew, in no manner effected a diminution of the bankrupt's estate.

4. The payment by Hall to the defendant, while based in part on the amount of back rent due from Bartholomew, was not a discharge of Bartholomew's indebtedness.

These propositions we will take up in the order of their statement.

1. *As the owner of the ranch, the defendant had the right to impose any condition it might see fit upon a new tenant as a prerequisite to granting him a lease.*

This is a self-evident proposition, which requires the citation of no authorities. The only thing which can restrict an owner of property in his complete control and distribution is an outstanding lien or interest therein, contractual or otherwise. As Bartholomew's lease contained a covenant against assignment (Plaintiff's Exhibit I, paragraph 3, pp. 3-4, and paragraph 12, p. 24), he had no assignable interest in the property even during the term of his lease, and as his lease expired on September 30th, and the lease to Hall was made on October 1st, no one had any right on that date to interfere with the freedom of the defendant to contract with respect to its property in any way it chose.

2. *The money that the defendant received was never part of the bankrupt's estate, but was the sole and exclusive property of Hall.*

It appears from the evidence, without contradiction, that Hall paid to Eastman the sum of \$1764.25 by writing out his personal check in favor of the defendant on his own bank account. Bartholomew never had any part of this sum in his possession, and, in fact, did not know the amount of the check when it was delivered (pp. 26-7). We are utterly at a loss to conceive how this payment by Hall to the defendant out of his own funds could have been made the basis of the finding of the Court (p. 10) that

“on or about said 1st day of October, 1925, and while so indebted to defendant, *the bankrupt transferred to the defendant, out of the property of the bankrupt, which was subject to the claims of the said general creditors the sum of \$1764.25, in full payment of such antecedent general debt, so due the defendant as aforesaid, and thereby diminished the estate of the bankrupt to that extent.*”

How can it be said that the money in bank belonging to Hall, upon which the check was drawn, was either the property of Bartholomew or subject to the claims of Bartholomew's creditors? We confess that we cannot answer this question. The payment was not made at the direction or request of Bartholomew, but was made because the defendant required it as part of the consideration for the execution of the lease, as the first paragraph of the lease clearly provides (Defendant's Exhibit A, p. 38). The only reason for Bartholomew's

presence at the time the lease was signed clearly appears from Eastman's testimony (p. 44) :

"Before I asked Hall to sign the lease, I asked Bartholomew if he was ready to leave the ranch. He said he was, that all he had to do was to go out and get his suitcase and he was going that afternoon."

Eastman manifestly did not want to take any money from Hall until he was sure that Bartholomew was going to leave peaceably. There was no question in anyone's mind as to the fact that Bartholomew had to go, for, as Judge Slack testified (p. 60) Bartholomew

"Knew perfectly well from what I have told him that he would have to quit after the 30th, because he could not get a new lease, and we would run the ranch ourselves if we could not get a new tenant."

The record does not contain a single word from which it might be inferred that Bartholomew had anything to do with the closing of the deal between Hall and the defendant. He handled no money, he gave no directions to either Hall or Eastman, and he manifested no interest in the transaction. All that he did was to have some discussion with Hall as to the amount his creditors were to get from the "stuff on the ranch."

It was evidently the theory of the plaintiff on the trial that there was a binding agreement of sale between Bartholomew and Hall for \$4500. Conceding for the moment that such was the fact, such an agreement would have been merely an executory agreement of sale and could have given Bartholomew no claim

against or ownership in, any particular funds belonging to Hall. Bartholomew's only remedy for the non-payment of the total purchase price would have been to sue Hall for the unpaid balance. But the evidence clearly shows that there was no such agreement. At the risk of seeming tedious, we will again quote all the testimony on the \$4500. Bartholomew testified on direct examination (p. 26) :

"So the next morning Mr. Hall came out to the ranch. He said, 'I cannot pay you the \$6500.00. Mr. Eastman told me to take a pencil and paper and take down the stuff on the ranch and just give you what the stuff is worth on the ranch.' I said, 'No. No pencil and paper will you use here.' *He said, 'All I can give you is \$4500 for the ranch and for the stuff.'* So I did not know what to do about it.

"I went down and spoke to Mr. Martinelli, Mr. Grandi and Mr. Scilacci, who were creditors of mine. I told them the story.

"I went down that morning to Inverness, and I met Mr. Hall and Mr. Eastman down there. Mr. Eastman asked me to go up to his house with Mr. Hall. We went up there. *Mr. Hall asked me if I wanted to give him the place for the money. I told him he might as well have it, I guess, or something like that,* so Mr. Hall wrote out Mr. Eastman a check for some money. I did not see what it was. *We went over to Mr. Martinelli's store and fixed everything in his store for \$4500.*"

On cross-examination, Bartholomew testified (p. 34) :

"The first talk about \$4500 was on the morning after my lease was up. Mr. Hall came out to my place about 8 o'clock in the morning. He said, 'Bill, I was talking to Mr. Eastman and he told me to come out and get a pencil and paper and take down the stuff you have on the ranch and offer you what-

ever we find the stuff is worth.' I told him that he would not do anything of the sort. After a while he said, '*All the money I can raise is \$4500.*' So I didn't know what to say, and I went down and talked it over with Mr. Martinelli, and he told me to let the thing go if I wanted to. That was after my lease expired. It was on October 1st.

"The first talk I ever had with Hall about \$4500, the new price, was on this morning after the lease was up."

Eastman testified concerning the \$4500 as follows (p. 44) :

"Hall and Bartholomew had some discussion about the purchase by Hall of the remainder of Bartholomew's personal property on the ranch. Hall told Bartholomew that he was not going to give him—I think he mentioned \$4500, or something of that sort. He said he was asking too much for the ranch, and that he was not going to give him as much as he asked for it. *Hall said that he would not pay altogether more than \$4500.* He did not say anything about the amount he paid the defendant. That is all the conversation I recall."

Hall's testimony was as follows (pp. 50-51) :

"I saw Bartholomew the next morning, after his lease had expired. I went out to his ranch and saw him there. It was understood that I was to have the ranch, and his lease had expired, and we were to go to Mr. Eastman to prepare for the signing of a new lease. Bartholomew did not seem very much interested in how much he got—it was to go to the creditors. *I told him that \$4500 was as much as I would be willing to pay out on the deal. I knew I had to pay \$1764.25 to the defendant to get the lease, and all I wanted to pay out on the deal was \$4500; I told Bartholomew that;* I did not come to any understanding as to how much I was to pay before Bar-

tholomew and I went to Eastman's residence that morning. While I was at the ranch, Bartholomew told me all he had to get was his suitcase. I signed the lease on October 1st, when Bartholomew and I went to Eastman's residence.

"Up to the time when I signed the lease, I had reached no conclusion with Bartholomew as to whether or not I would take the remainder of his property, or what price I would pay for it."

And again (pp. 51-2) :

"At the time of signing the lease we tried to agree and settle it right there but when we saw that we could not agree and it was time to take the lease we agreed that I sign the lease and square with the company and then if we could not agree we would appear before the creditors and sort of let the creditors decide the price that I should pay.

"After my lease had been signed and Bartholomew had allowed his lease to expire, I knew that Bartholomew had no good will to sell, and that there was nothing left for Bartholomew to sell except what remained of his personal property on the ranch."

We have already quoted the remainder of Hall's testimony as to closing up the deal at Martinelli's office. From the foregoing it is obvious—

- (1) That no deal between Hall and Bartholomew was concluded at the ranch for any price;
- (2) That no such deal was concluded in Eastman's residence;
- (3) That Hall never offered Bartholomew \$4500 for his property;
- (4) That the deal was closed at Martinelli's store; and
- (5) That the final and only price agreed on was the

sum of \$2800, which is set forth in the written agreement, Plaintiff's Exhibit 2 (pp. 27-8).

The only language in the record which could possibly be construed, or rather misconstrued, into an offer of \$4500, is Bartholomew's first statement that Hall said "All I can give you *for the ranch* and for the stuff is \$4500." In view of Hall's testimony and Bartholomew's admission that they both knew that Hall had to pay some \$1700 for the lease, and they both knew that Bartholomew had no interest in the ranch, this language cannot be construed into an offer of \$4500 for the "stuff," particularly in view of Hall's statement, immediately preceding the so-called offer, to the effect that Eastman told him to take pencil and paper and inventory the stuff and give Bartholomew just what it was worth. Bartholomew's subsequent version of Hall's remarks, namely, that Hall said that all he could *raise* was \$4500, is undoubtedly the correct statement of what transpired, for it accords exactly with Hall's testimony on the subject. If, after Hall had taken the stand and told his story, there had been any doubt as to exactly what occurred, the plaintiff had an opportunity to question Bartholomew on the point, but he did not touch it when Bartholomew took the stand in rebuttal. Therefore this Court should properly consider that Bartholomew's statement on direct examination, insofar as it was inconsistent with Hall's statement, should be deemed to have been corrected and superseded by Bartholomew's later testimony on cross-examination.

Even if it were the duty of the Court to go beyond

the reasonable construction of the record in an endeavor to uphold the lower Court, and to accept Bartholomew's first statement as a definite offer of \$4500 for the "stuff" alone, (which, by the way, ignores the possibility that the word "you" contained in the alleged offer might have been used by Hall in the plural as "you, Bartholomew, the owner of the stuff, and you, the defendant, the owner of the ranch"), there was no acceptance of the offer, for Bartholomew "did not know what to do," and went off to consult his creditors.

The only other language in the record which can be construed as a renewal of any offer was Bartholomew's statement that, at Eastman's residence, Hall asked him if he wanted "to give him the place for the money," and that he replied that Hall "might as well have it," or something like that. The amount of money referred to was not specified, and while Bartholomew said that they fixed it up at the store for \$4500, it is obvious that he meant that they fixed it up on an outlay of approximately \$4500 by Hall. Assuming that the written agreement of sale (Plaintiff's Exhibit 2, p. 27), could be varied by parol, it is evident that Bartholomew's statement is inaccurate, because the \$2800 provided in the agreement, added to the \$1764.25 paid by Hall to the defendant, totals \$4564.25. The truth is again with Hall's and Eastman's testimony that Hall and Bartholomew came to no agreement at Eastman's residence, and that the final and only agreement was embodied in the written agreement of sale, which was concluded after Martinelli had requested Hall to agree to pay an even \$2800.

3. *The payment by Hall to the defendant, while it may have reduced the amount which Hall might otherwise have been willing to pay to Bartholomew, in no manner effected a diminution of the bankrupt's estate.*

As we have already pointed out, Bartholomew owned nothing but the personal property on the ranch on October 1st, when the payment to the defendant was made by Hall. His lease was up; his good will, so-called, was gone, as Hall knew (p. 52), and he had the option of selling his personal property or moving it off the ranch. The defendant could have compelled him to surrender possession of the ranch and to move off his personal property, but, knowing that, as Judge Slack testified, the property in place on the ranch ready for use would have a much greater value and would bring more money for the creditors if sold in place, Bartholomew, with the assent of the defendant, sold it to the incoming tenant. If, after Hall had paid the defendant the \$1764.25, Bartholomew and Hall had not come to an agreement for the sale of the personal property, there was nothing in the world to prevent Bartholomew from moving the stuff off and disposing of it to any other person for any price he might be able to get. We challenge counsel for the plaintiff to show any change in Bartholomew's position or in his assets which resulted from the payment by Hall to the defendant and the execution of the lease.

The truth of the matter is that Hall was willing to pay the defendant a bonus of \$1764.25, or any reasonable amount the defendant might fix, in order to get a one-year lease, because he knew that it has never been

the custom of the defendant to dispossess a satisfactory tenant, and having confidence both in his own ability to run the ranch satisfactorily and in the continuance of the friendly attitude of the defendant toward its good tenants, he felt that he could afford to pay an amount nearly equal to one year's cash rent for the privilege of becoming a tenant on the ranch.

4. *The payment by Hall to the defendant, while based in part on the amount of back rent due from Bartholomew, was not a discharge of Bartholomew's indebtedness.*

Eastman's testimony (p. 40) is that the \$1764.25 "was based on the \$1464.25 which was still due from Bartholomew and \$300 based on the fact that the rental of the ranch had to be reduced from \$2500 to \$2200"; and (pp. 43-2) "as a result of my conversation with Judge Slack, I told Hall that he could have the ranch for a rental of \$2200 by paying \$1700, or a little over, as a consideration for a new lease to him."

Judge Slack testified (p. 56) :

"I fixed the amount of the consideration named in the lease on the basis of \$1464.25, the back rent, which we have been unable to collect from Bartholomew, and the \$300 difference between that sum and the amount specified in the lease as a consideration, was due to the fact that the normal cash rent of the property was and had been for some time \$2500 a year. Hall, by reason of the run-down condition of the property and the loss—missing—of a whole herd of stock, besides other stock, refused to pay more than \$2200. That established, for the time being and for some time in the future, the cash rent of \$2200. Consequently, the difference for one year,

to wit, \$300, was added on, by my insistence, to the cash consideration which Hall or anybody else would have to pay for getting the lease."

The lease itself (Defendant's Exhibit A, p. 38) describes the \$13,764.25 as a further consideration for the lease. Nowhere does it appear in the record that the defendant gave Bartholomew any receipt or acquittance for the rent at any time, or offered to do so. While Judge Slack, before the creditors claimed the \$1764.25, individually intended to waive the claim of the defendant for back rent, he reserved the right to make the claim and so told the creditors (p. 62). While Bartholomew testified (p. 27) that the defendant was "to get \$1400 back rent which I owed," his statement could not bind the defendant, and there is nothing in the record which can be construed as a release of Bartholomew's indebtedness to the defendant.

In the foregoing pages we have discussed the evidence in this case at somewhat greater length than is usual in the ordinary appeal, for the reason that there is no question of law involved in the appeal which admits of dispute. The proposition of law upon which we rely is one that is uniformly supported by the Bankruptcy Act itself, by the text books and by all of the decisions, without exception. This proposition is as follows:

In order that there may be a voidable preference, there must be a transfer of the property of the bankrupt, not of a third person, and the transfer must effect a diminution of the estate of the bankrupt.

That the transfer must be one of the property of the bankrupt clearly appears from the language of the Bankruptcy Act itself. Section 3 of the Act provides, in part, as follows:

“Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of *his property* with intent to hinder, delay, or defraud his creditors, or any of them, or (2) transferred, while insolvent, any portion of *his property* to one or more of his creditors with intent to prefer such creditors over his other creditors.” (Italics ours.)

In both Subdivision a and Subdivision b of Section 60 of the Act, reference is made to a person “having made a transfer of any of *his property*”; and in Section 70e of the Act it is provided that “the trustee may void any transfer by the bankrupt of *his property*.”

We quote the following from the text books:

“The second act of bankruptcy consists of a debtor transferring while insolvent any portion of *his property* to one or more of his creditors with intent to prefer such creditor or creditors over his other creditors. . . . In addition to this *it must be shown that the transfer results in the depletion of the debtor's estate*, and that the creditor to whom the transfer is made thereby secures an undue advantage over other creditors of the same class. As in the case of the other acts of bankruptcy it must have been committed within the four months preceding the filing of the bankruptcy petition. *The interdicted transaction here must be between a debtor and his creditors.*” (Italics ours.)

"The preferential transfer must result in the depletion of the debtor's estate, so as to leave the other creditors without property out of which their claims may be paid. If there is no depletion of the estate, the creditors cannot complain. . . . The transfer must consist of the bankrupt's OWN PROPERTY to constitute a preference; payment of a note of a bankrupt by an indorser would not be sufficient; nor would payment by an attorney, out of his own funds, of a claim against his client, constitute an act of bankruptcy by the client." (Italics ours.)

Id. p. 140.

"Some portion of the debtor's property must have been appropriated by the transaction, and the insolvent estate thereby diminished. Preference implies appropriation of assets and depletion of the trust fund thereby." (Italics ours.)

4 *Remington on Bankruptcy*, Sec. 1630 (3d ed.).

"Of course, the payment of the bankrupt's debt by a third party, where no property of the bankrupt was transferred to such party, is not a preference; the third party simply becomes a creditor in place of the original creditor." (Italics ours.)

Id. Sec. 1649.

"To constitute a preference voidable by the trustee in bankruptcy, (1) there must have been an act of the debtor in procuring or suffering the entry of a judgment against him or in making a transfer of his property." (Italics ours.)

Black on Bankruptcy, p. 595 (1924 ed.).

"An essential element of a preferential transfer voidable under Section 60 is that the transfer be

made by an insolvent person to or for the benefit of his creditor.

"A transfer by a person other than the bankrupt to the creditor does not constitute a preference." (Italics ours.)

1 *Loveland on Bankruptcy*, Sec. 496.

"In order to establish a voidable preference, it is necessary that the debtor shall have transferred to a creditor some portion of his own property which his other creditors had a right to subject to the payment of their claims." (Italics ours.)

7 *Corpus Juris*, Sec. 266, p. 165.

The earliest case in the Supreme Court of the United States, which is distinctly in point, is the case of *New York National Bank vs. Massey*, 192 U. S. 138, where the Court, in sustaining the right of a bank to apply the balance of a regular bank account in partial satisfaction of a debt due from a bankrupt at the time of the filing of the petition in bankruptcy, held that the fact that, by such application, the bank received a greater proportion of its debt than other creditors, did not operate to create a preferential transfer, because the estate of the bankrupt was not diminished by such application and because there was no transfer of the property of the bankrupt, the Court saying (p. 147):

"The law requires the surrender of such preferences given to the creditor within the time limited in the act before he can prove his claim. These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor and the consequent diminu-

tion of the bankrupt's estate. It is such transactions, operating to defeat the purposes of the act, which under its terms are preferences." (Italics ours.)

In the case of *Mason vs. National Herkimer County Bank*, 172 Fed. 529, decided by the Circuit Court of Appeals for the 2nd Circuit, Mason, as trustee in bankruptcy of the Newport Knitting Company, sued the bank to set aside an alleged voidable preference, arising out of the payment by the Titus Sheard Company to the bank of the amount of indebtedness of the Newport Knitting Company on a note to the Sheard Company, which had been endorsed by the latter company to the bank. The two companies were engaged in the same general character of business, and several persons held offices and were stockholders in both companies. At the time of the payment of the note by the Sheard Company, that company was indebted to the Newport Company on an open account, and it credited itself on the open account with the amount of its payment to the bank. The Circuit Court of Appeals, in holding that the transaction did not constitute a voidable preference, said (p. 530) :

"The one thing absolutely essential to a preference is that the bankrupt transfer some portion of his property to the creditor. If the creditor receive none of the bankrupt's property, there is no preference. And that is the primary difficulty with the complainant's case. The defendant bank received no property or money of the Newport Company. The Sheard Company as indorser of the note took up and paid its own funds therefor—funds in which the Newport Company had no interest whatever. It is true that the Sheard Company at the time it paid

the note was indebted to the Newport Company, but that in no sense made its funds the property of the latter. An unsecured creditor has no interest in his debtor's property until he has sequestered it. The money which the defendant received belonged to the Sheard Company, and not to the bankrupt. It follows, then, that there was no preference unless that which was actually done can be treated as the equivalent for something else." (Italics ours.)

The case was taken to the Supreme Court under the title of *National Bank of Newport vs. National Herkimer County Bank*, 225 U. S. 178. Mr. Justice Hughes, in affirming the judgment of the Circuit Court of Appeals, said (pp. 184-5) :

"But, unless the creditor takes by virtue of a disposition by the insolvent debtor of his property for the creditor's benefit, so that the estate of the debtor is thereby diminished, the creditor cannot be charged with receiving a preference by transfer. Western Tie & Timber Company vs. Brown, 196 U. S. 502, 509; Rector vs. City Deposit Bank, 200 U. S. 405, 419. These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor and the consequent diminution of the bankrupt's estate. N. Y. County Bank vs. Massey, 192 U. S. 138, 147.

"Here, the payment to the bank did not proceed from the bankrupt, the Newport Knitting Company. The Titus Sheard Company had a standing quite apart from its relation to the Newport Knitting Company as a debtor in the account. In the transaction with the bank, the Titus Sheard Company acted on its own behalf. As the holder of the original note, that company had endorsed it to the bank, taking for its own benefit the proceeds of the discount. Its obligation as endorser was continued by the renewals, and to secure the bank on the last renewal it had deposited its own collateral. It took up the

note with its own funds and received back the security. Neither directly nor indirectly was this payment to the bank made by the Newport Knitting Company, and the property of that company was not thereby depleted.

"The fact then is not, as it is contended, that 'the bankrupt parted with property to the amount of the note and the bank received it,' but rather that the bankrupt parted with nothing, and the bank received the money of the endorser and redelivered to the endorser the paper and collateral." (Italics ours.)

In the case of *Continental etc. Trust & Savings Bank vs. Chicago Title & Trust Co.*, 229 U. S. 435, the Supreme Court had under consideration the validity of an arrangement made between the appellant's predecessor and Anderson & Company, grain brokers, with reference to the transfer of certain brokers' margin certificates of the bankrupt, Prince, which had been deposited with the bank as collateral for dealings in grain on the Chicago Board of Trade. The Court, in holding that the substitution by Anderson & Company of its margin certificates for those of the bankrupt, did not appear to have diminished the bankrupt's estate in any way and therefore did not constitute a voidable preference, although the indebtedness of Prince to the bank thereon was satisfied by the transfer, said (p. 443) :

"This case must be dealt with in the light of certain principles, established by decisions of this court, in determining the applicable provisions of the Bankruptcy Act. *To constitute a preferential transfer within the meaning of the Bankruptcy Act there must be a parting with the bankrupt's property for the benefit of the creditor and a consequent diminution of the bankrupt's estate.* New York County Na-

tional Bank vs. Massey, 192 U. S. 138, 147; *Newport Bank vs. Herkimer Bank*, 225 U. S. 178, 184.” (Italics ours.)

And again (229 U. S. 444) :

“*The fact that what was done worked to the benefit of the creditor, and in a sense gave him a preference, is not enough, unless the estate of the bankrupt was thereby diminished.* · *New York County National Bank vs. Massey*, *supra*.” (Italics ours.)

The latest decision of the Supreme Court on the proposition that the transfer must be one of the bankrupt's own property in order that there may be a voidable preference, is the case of *Bailey vs. Baker Ice Machine Co.*, 239 U. S. 268, where the court, following its previous decisions hereinabove quoted, said (p. 273) :

“The question next to be considered is whether the contract operated as a preferential transfer by Grant Brothers within the meaning of Sec. 60b of the *Bankruptcy Act*, as amended June 25, 1910, c. 412, 36 Stat. 838, 842, . . . The Section leave no doubt that to be within its terms the transfer must be one which a bankrupt makes of his own property and which operates to prefer one creditor over others; and if further light be needed there is a declaration in the *Bankruptcy Act*, July 1, 1898, 30 Stat. 544, 545, Sec. 1, clause 25, that the word ‘transfer’ shall be taken to include every mode ‘of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.’ It therefore is plain that Sec. 60b refers to an act on the part of a bankrupt whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor and thereby diminishes the estate which the *Bankruptcy Act* seeks to

apply for the benefit of all the creditors. *New York County National Bank vs. Massey*, 192 U. S. 138, 147. Applying this test to the contract in question, we think it did not operate as a preferential transfer by Grant Brothers, the bankrupts. The property to which it related was not theirs but the Baker Company's. The ownership was not transferred, but only the possession, and it was transferred to the bankrupts, not from them. Being only conditional purchasers, they were not to become the owners until the condition was performed. No doubt the right to perform it and thereby to acquire the ownership was a property right. But this right was not surrendered or encumbered. On the contrary, it remained with the bankrupts and ultimately passed to the trustee, who was free to exercise it for the benefit of the creditors. So, there was no diminution of the bankrupt's estate." (Italics ours.)

In order not unduly to prolong this brief, we cite, without quoting therefrom, the following decisions, in each of which a payment or transfer of the property of a third person was held not to constitute a preference:

Dressel vs. North State Lumber Co., 119 Fed. 531, 534 (D. C., E. D. of N. C.);

In re Hines, 144 Fed. 543, 547 (D. C., W. D. of Pa.);

Catchings vs. Chatham National Bank, 180 Fed. 103, 104 (C. C. A., 2d Cir.);

Aiello vs. Crampton, 201 Fed. 891, 893 (C. C. A., 8th Cir.);

In re Grocers' Baking Co., 266 Fed. 900, 909 (D. C., M. and N. D. of Ala.);

Miller vs. Fisk Tire Co., 11 Fed. (2d) 301, 304 (D. C., D. of Minn.).

The early case of *In re Pearson*, 95 Fed. 425 (D. C., S. D. of N. Y.), presents facts somewhat analogous to those in the incident case. The case arose on a petition to have Pearson declared a bankrupt because of an alleged preference arising out of the sale by Pearson to one Knox of his leasehold interest in certain hotel property, together with the furniture situate therein. The purchase price, amounting to \$9000, was paid partly in cash and partly in notes, which were immediately applied by Pearson to the payment of certain back rent due the owner of the property and certain water taxes chargeable against the property. It appeared from the terms of the lease that it could not be assigned without the consent of the landlord, and the payments of the debts, which were claimed to be preferences, were the necessary conditions to obtain the landlord's consent to the assignment. In holding that the payments did not constitute preferences, and therefore that an act of bankruptcy was not established and the petition should be dismissed, the Court said (p. 426):

"The lease produced showed that it could not be assigned by the defendant or transferred without the consent of the landlord. It had nearly three years to run, and it was the most valuable asset. In this situation it is manifest that nothing whatever could be realized from the lease except through the landlord's assent to a transfer, which could not be obtained except on payment of the back rent. A transfer to the purchaser, leaving the purchaser to pay the back rent, would necessarily involve the deduction of so much from the purchase price payable to the defendant for the sale of the property; so that evi-

dently it was immaterial whether the transfer took that shape, or whether the purchaser should pay the whole \$9000 to the defendant, he at the same time paying off the back rent and water charges and other incidental expenses of the transaction. The latter was the course actually adopted. The lease was transferred to one Knox who paid the \$9000 partly in cash, and partly in notes, which were in part immediately applied to pay off the back rent, taxes, and charges connected with the sale. The payment of all these was a necessary condition of realizing anything from the leasehold property, or obtaining the assent of the landlord. *They were all paid from Knox's money and notes,* and in their essential nature these payments were not preferences, but merely a means of making sale of the leasehold, and realizing what was possible from it. The alleged act of bankruptcy not being established, the petition should, therefore, be dismissed, but in this case without costs." (Italics ours.)

From the foregoing authorities, it is manifest that when Hall paid to the defendant the sum of \$1764.25 in order to obtain a lease of the defendant's property, there was no diminution of the bankrupt's estate. On the contrary, it was this payment which made possible the sale from Bartholomew to Hall of Bartholomew's personal property for the sum of \$2800. Hall never would have bought the property except to use it on the defendant's ranch, and had Hall not used his own funds to pay the defendant the cash consideration demanded for the lease, Bartholomew would have had on his hands a miscellaneous lot of personal property of a greatly depreciated value.

For the foregoing reasons, we respectfully submit
that the judgment of the lower Court should be reversed.

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No. 5019

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

3

O. L. SHAFTER ESTATE COMPANY, a corporation,

Plaintiff in Error,

vs.

W. T. MOONEY, Trustee in Bankruptcy
of the Estate of William Bartholomew, Bankrupt,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF FACTS.

This is an appeal from a judgment of the United States District Court for the Northern District of California in favor of a trustee in bankruptcy in an action to recover a transfer of money alleged to be a voidable preference under the provisions of Sec. 60-a-b of the Bankruptcy Act.

All of the elements of a voidable preference were conceded by the defendant, with a single exception,

that is to say, it was conceded, that if the money transferred was the property of the bankrupt, the transfer occurred within four months of the commencement of the bankruptcy proceedings, that the bankrupt was insolvent at the time of the transfer, that the effect of the transfer will be to enable the defendant to secure a greater percentage of its debt as of the date of the transfer than other creditors of the same class, and that the defendant had reasonable cause to believe that the bankrupt was insolvent at the time of the transfer and that the effect of the enforcement of the transfer will be as indicated; but it was denied by the defendant in its answer that the property transferred was the property of the bankrupt, and so the trial centered around this issue:

**Was the property covered by the transfer the
property of the bankrupt and was his estate
diminished by such transfer?**

The facts were not very much in conflict, and it is with respect to the inferences to be drawn from these facts that we are mostly concerned. And, upon familiar principles, it will be presumed by the appellate court that findings of fact by the court below were correct if there is any substantial legal evidence upon which it may be seen that the findings of fact in question aided by every reasonable inference, could, with reason, have been based. (3 Cyc. 308 and cases cited.)

Briefly, the facts were these: William Bartholomew, the bankrupt, leased from the O. L. Shafter Estate Company, under a written lease, the "N" Ranch near

Inverness, Marin County, California, and certain cows and heifers thereon, for a term of one year commencing Oct. 1, 1924, and ending Sept. 30, 1925, at a rental of \$2500 plus a certain number of calves which might be born during the year (Trans., p. 14). Towards the end of the term, Bartholomew was behind about \$1400 on his rent (Trans., p. 25) and there was a claim against him by the landlord of \$300.00 for calves lost in a storm (Trans., p. 27). He owned the equipment on the ranch, that is to say, the horses, wagons, milking machines, dairy utensils, engine, etc. (Trans., p. 27).

Bartholomew planned to sell out his property and pay up the back rent and leave the place when the lease expired (Trans., p. 25). W. T. Hall told Bartholomew about two weeks before the lease expired that he wanted to take over the ranch and they agreed upon a price of \$6500 for Bartholomew's property. A few days before the lease was up, Bartholomew asked Hall for a deposit which he refused to give and so Bartholomew told Hall the deal was off (Trans., p. 25). The morning after the lease expired, Hall went out to the ranch and told Bartholomew that he would not pay \$6500.00 but would pay \$4500.00. A little later in the morning Bartholomew met Hall at the residence of L. C. Eastman, the superintendent of the O. L. Shafter Estate Company, and there agreed to let Hall have his property for \$4500.00 (Trans., p. 26). The O. L. Shafter Estate Company made it plain to Hall and Bartholomew that they would not give Hall

a new lease unless the \$1400 back rent due from Bartholomew, and the claim of \$300 for the loss of calves, was paid, and this was understood by them (Trans., pp. 27, 50). Hall did not want Bartholomew's equipment without the lease (Trans., p. 50) and it was necessary for Bartholomew to sell to Hall in order to realize full value for his property, for, otherwise, the property if removed from the ranch and sold elsewhere would not bring 50% of its value (Trans., p. 60).

Hall and the O. L. Shafter Estate Company had some negotiations respecting the amount of rent that Hall was to pay under the new lease. Hall wanted to pay only \$2200.00 per year, instead of the \$2500.00 paid by Bartholomew, on account of the run-down condition of the ranch, which run-down condition was conceded by everybody (Trans., pp. 41, 42, 50, 56, 57). This rent was accepted by the landlord, but the company tacked on as "consideration for the lease," \$1764.25, to cover \$1464.25 unpaid rent due from Bartholomew, and the \$300.00 item testified by Bartholomew to be for loss of calves and by C. W. Slack, the vice-president and general manager of the O. L. Shafter Estate Company, to be for the difference in rental between the amount paid by Bartholomew the previous year and the amount to be paid by Hall. (Trans., pp. 27, 43, 56, 59, 62, 63).

At the conference at Eastman's house, Hall, with the consent of Bartholomew, paid Eastman for the Shafter Estate Company the \$1764.25 to cover the

back obligations of Bartholomew to the company, and then they went over to the Martinelli's store and there agreed that the balance should be an even sum of \$2800, and this money was turned over to Bartholomew's creditors (Trans., pp. 27, 35, 44, 45, 47, 52, 53).

At a subsequent meeting of the creditors, L. C. Eastman did not make any claim on behalf of the O. L. Shafter Estate Company against the \$2800.00 (Trans., p. 48), nor did C. W. Slack (Trans., p. 62). The company owned other ranches in the same vicinity and made many other leases, but never, in any other instance, exacted a cash consideration for the lease. (Trans., pp. 55, 61).

ARGUMENT.

The position of appellant is that the \$1764.25 was paid by Hall as consideration for the lease and was never a part of Bartholomew's property, and that the said sum of \$2800 was the total purchase price, and not \$4564.25, paid by Hall to Bartholomew for the equipment on the ranch.

The position of respondent is that the total purchase price of the equipment was \$4564.25, but that, in order to complete the deal, it was necessary for Bartholomew to permit Hall to pay the O. L. Shafter Estate Company \$1764.25 of this amount to cover unpaid claims of the company against Bartholomew, for, otherwise, the company would not have given

Hall a lease, and Hall did not want the equipment without the lease. The labelling of this \$1764.25 as "consideration for the lease" was merely a subterfuge in an attempt to legalize the receipt of this preference. This was the view adopted by the trial court.

We think that a brief digest of the evidence, so far as it is pertinent to the only issue in the case, viz.:

Was property of Bartholomew involved in the transfer and was his estate to which his general creditors had the right to look for the satisfaction of their claims diminished thereby?

will serve, perhaps more than citation of authorities, to demonstrate that the effect of the transaction was the creation of an indirect preference in favor of the O. L. Shafter Estate Company. The courts will not permit a preference to be effected by indirection. Mere circuity of arrangement will not save a transfer which effects a preference from being invalid as such.

Dean v. Davis, 242 U. S. 438; 61 Law Ed. 419; 37 Sup. Ct. Rep. 130; 38 Am. B. R. 664, affirming 31 Am. B. R. 808; 212 Fed. 88;
National Bank v. National Herkimer County Bank, 225 U. S. 178, 184; 28 Am. B. R. 218; 56 Law. Ed. 1042, 1046; 32 Sup. Ct. Rep. 633.

This digest follows:

Digest of the Evidence.

“WILLIAM BARTHOLOMEW
 “Up to October, 1925, I resided at the ‘N’ Ranch, at Point Reyes, Marin County, California,

which I was leasing from the defendant under a written lease. (This lease is set out in full in the transcript, and provides for a term commencing Oct. 1, 1924, and ending Sept. 30, 1925, with a rental of \$2500 plus some calves, Trans., pp. 14-24). I paid rent all the times I was there, for about three years, and I paid all the rent with the exception of \$1400 odd. I dealt with L. C. Eastman, representing the Shafter Estate Company. He is the superintendent of the ranches up there. * * * He demanded payment of the rent. I told him I did not have the money. I was figuring on selling out and as soon as I sold out the place they would get their money. I owned all the equipment on the ranch, horses and wagons and milking machines and dairy utensils and engine and stuff. All they owned was the land, the cows and the buildings. * * *" (Trans., pp. 24-25).

"W. T. Hall came to me first about two weeks before my lease was up and wanted to buy the ranch, so I sold the ranch for \$6500. * * * He said he would take the ranch for \$6500. * * * About two or three days before the lease was up Mr. Hall came out and I asked him for a deposit on the place, which he would not give me. He said that Mr. Eastman told him not to give me any money at all. I figured then that there was something wrong somewhere and I told him that I would not sell the place, so he went away. * * * So the next morning (after the lease was up) Mr. Hall came out to the ranch. He said: 'I cannot pay you the \$6500.' * * * He said: 'All I can give you is \$4500 for the ranch and the stuff' " * * * (Trans., pp. 25-26).

"I went down that morning to Inverness, and I met Mr. Hall and Mr. Eastman down there. Mr. Eastman asked me to go to his house with Mr. Hall. We went up there. Mr. Hall asked me if I wanted to give him the place for the

money. I told him he might as well have it, I guess, or something like that, so Mr. Hall wrote out Mr. Eastman a check for some money. I did not see what it was. We went over to Mr. Martinelli's store and fixed everything in his store for \$4500. After the \$1700 was paid to Mr. Eastman there was \$2760 left or something like that. Mr. Martinelli and I asked Mr. Hall if he would not make it out for \$2800 even money. There was \$1400 and some dollars for the rent and \$300 for calves which were lost in the 1923 storm, and so he said he would make it for the \$2800 even money. I did not see the check Mr. Hall gave Mr. Eastman, but it was supposed to be seventeen hundred and some dollars. In that conversation they were to get \$1400 back rent which I owed and \$300 for the calves before Mr. Hall could get the lease. That was said between Hall and Eastman and myself on that occasion" (Trans., pp. 26-27).

"* * * Mr. Eastman told Mr. Hall, and of course I knew myself, that before anyone could take take over the ranch they had to pay that back rent of mine and that \$300 for calves which they say that I either lost or stole. * * * Mr. Hall came to my place and wanted to know if I wanted to sell the place and I told him I did. He wanted to know what I wanted for the ranch and I told him that I wanted \$6500. He asked me what I paid for the ranch and I told him I paid \$6250 and I spent about \$2500 for stuff I put on the place. * * * He came back a day or so later and was satisfied with the place and said he would take it at \$6500. * * * There were 9 head of horses, about 50 or 55 head of hogs, 3 milking machines, a wagon, a Ford automobile truck. All of the stuff on the ranch that belonged to me was sold to him for \$6500." * * * (Trans., pp. 30-31).

"Q. In other words, the deal for \$6500 fell through because he would not pay you a deposit,

because Mr. Eastman had said not to pay any money to you, is that right? A. Yes" (Trans., p. 33).

"The first talk about \$4500 was on the morning after my lease was up. Mr. Hall came out to my place about 8 o'clock in the morning. * * * After a while he said: 'All the money I can raise is \$4500.' * * * The first talk I ever had with Hall about \$4500, the new price, was on the morning after the lease was up" (Trans., p. 34).

"I saw Mr. Eastman the night before my lease expired, I think it was on September 30th. He told me that Mr. Hall was going out the next morning and take possession of the ranch and he told me to sell out to Mr. Hall as rapidly as possible" (Trans., pp. 34-35).

"On the morning of October 1st, in the conversation between Hall and Eastman and myself, at Eastman's residence, Eastman said the \$300 was for the calves that were supposed to be lost. There were 20 head of calves lost during the 1924 storm upon the hill and they were found dead by hunters up there on the hill. The company charged Hall up with \$300 for those calves" (Trans., pp. 62-63).

"THE COURT

"I think it is apparent from Mr. Bartholomew's testimony, as the record now stands, that \$1400 was for the back rent and \$300 was for the loss of the calves and that that is the reason the check was drawn for \$2800."

"L. C. EASTMAN

"I reside and have resided in Inverness, Marin County, for five and a half years, during all of which time I have been, and now am, the superintendent of the defendant company.

"I know Mr. William T. Hall, who is the present tenant of the 'N' Ranch. His tenancy began

on October 1, 1925, under a written lease (This lease is set out in full in the transcript, and provides for a term commencing with Oct. 1, 1925, and ending Sept. 30, 1926, at a rental of \$2200, plus some calves. It also states that a part of the consideration for the lease is the payment of \$1764.25 by Hall) " (Trans., pp. 37-40). * * *

"When the lease was signed, I received \$1764.25 from Mr. Hall, by check, payable to the order of the defendant. This payment was made as a consideration for his obtaining the lease, and was based on the \$1464.25 which was still due from Bartholomew, and \$300 based on the fact that the rental of the ranch had to be reduced from \$2500 to \$2200, and the run-down condition of the ranch. The normal cash rental of the ranch was \$2500 but Hall would only pay us \$2200. That made a difference of \$300. * * * I told Hall he could have the lease on October 1st, but he would have to pay the company \$1764.25. * * * Judge Slack told Bartholomew that he did not seem to be getting along very well on the ranch, and things were becoming so run-down and in such a shape that he would have to get off. * * * When Judge Slack and I came out to the ranch, we looked around the buildings, and, as a result of our visit, I proceeded to make repairs, and probably a week or two later I had a man on the ranch to do some painting and repairing of the fences and gates and cleaning up in general. I could get Bartholomew to do very little in the way of repairs or cleaning up of the property" (Trans., pp. 40-42).

"I recall that Judge Slack left the state about the 12th or 14th of September, and returned on September 28th. During that time, Hall called upon me with reference to leasing the ranch. He first called about September 17th, and asked me, if he bought out Bartholomew, would he have a lease on the 'N' Ranch. I told him that Judge

Slack was in the East and that I would take it up with him as soon as he returned. I did not, at that time, say anything to Hall about what he or anyone else who took a new lease of the ranch would have to pay as a consideration for the lease" (Trans., p. 43).

"After Judge Slack returned, I told Hall that he could have the lease on October 1st, by paying the defendant \$1700. The day the lease was to expire, Hall told me that the ranch was in such condition that he felt that all he would be willing to pay would be \$2200, instead of the regular rent of \$2500. * * * I told him that I would take the matter up with Judge Slack, and I did so. As a result of my conversation with Judge Slack, I told Hall that he could have the ranch for a rental of \$2200 by paying \$1700, or a little over, as consideration for the new lease to him. * * * I told Hall not to pay Bartholomew any money, that he was very heavily in debt, and that any money that he would get from the sale of his equipment would have to go to the creditors. * * *

"During the month of September, I told Bartholomew that he must do his best to find a new tenant before the lease expired. My last conversation with him of that sort was on the night of September 30th. On that occasion I asked Bartholomew if he had sold, or had made any deal, or if he settled any deal for selling out the ranch to Hall. He said he had not. I advised him to go that night and come to some terms of settlement with Hall while he still had a lease on the place, because the next day his lease would be expired and I told him that, if I were in his place, I would certainly go that night and come to the best terms possible" (Trans., p. 43).

"I next saw Bartholomew on the following morning, October 1st, at my house. Hall was also there. * * * On that occasion this lease * * * was

signed. * * * I particularly called his attention to the provisions on the first page that he should pay the defendant \$1764.25 as a consideration for the lease. * * * Hall gave me the check for \$1764.25. Bartholomew was present at the time. * * * Hall and Bartholomew had some discussion about the purchase by Hall of the remainder of Bartholomew's personal property on the ranch. Hall told Bartholomew that he was not going to give him—I think he mentioned \$4500, or something of that sort. He said he was asking too much for the ranch, and that he was not going to give him as much as he asked for it. Hall said that he would not pay altogether more than \$4500. * * * On that occasion, at my residence, Hall and Bartholomew left my house to discuss the selling price further. They were discussing it as they left the house. * * * "(Trans., pp. 42-44). "I instructed Hall not to pay over any money to Bartholomew for the reason that he owed all the local merchants quite a bit of money" (Trans., p. 45).

"At one time during my talk with Hall, I told him he must pay \$1700 to get the lease. I told Hall that Judge Slack would give him the lease provided that he would pay to the Shafter Estate Company \$1700, that was on account of a little over \$1400 that Bartholomew owed us for back rent. * * * No consideration was required for the lease which I made with Bartholomew, which expired on October 1st. On October 1st, in the morning, Hall and Bartholomew and I met at my house. The lease, which I had at my house at that time, was signed by Hall and he gave me a check for \$1764.25. As they left my house, Hall and Bartholomew were discussing the price at which Bartholomew would sell to Hall the equipment that he, Bartholomew owned. Hall said that he would give Bartholomew what he was asking—I have forgotten just how he mentioned the price, or just what the price was.

Q. Is it not a fact that what was said was this: Bartholomew was asking \$6500 and Hall said he would not give more than \$4500. A. That may have been it. * * *

"I only attended the first meeting of the creditors on behalf of the Shafter Estate. At that meeting I may possibly have said that the defendant would have a claim for rent \$1400, which would have to be paid pro rata out of the \$2800. I am not positive that I said that. I have a faint recollection of saying it, however. We did not make any claim to the creditors on this fund. I may have said that we had power to make a claim, or indicated that we had the power to make a claim for \$1400, if we wanted to, but I did not make any claim, or put in any claim for the \$1400. I had no intention of putting in any claim" (Trans., pp. 47-48).

"WILLIAM T. HALL

"I am the tenant of the 'N' Ranch, owned by the defendant, under a lease signed October 1, 1925. * * * The first talk I had with Bartholomew about getting a tenant, or becoming a tenant of the 'N' Ranch, was in the early part of September. He told me the ranch was for sale, and if I knew of a buyer to send him out. Soon afterwards I made an investigation to see whether or not I could lease the property. In his first talk with me Bartholomew said the ranch was worth about \$6500. When I thought about trying to get a lease on the ranch, I went out to look at the property" (Trans., pp. 48-49).

"I asked Mr. Eastman whether or not, if I agreed with Bartholomew to buy him out, I would be accepted by the company as a tenant. * * * About the terms of the lease, I offered \$2200 a year, instead of the \$2500 which Bartholomew had paid. Mr. Eastman told me there was a

claim of \$1700 odd before the ranch would be leased again. He said I would have to pay it, or whoever took the ranch would have to pay this money in order to get a new lease. * * * Mr. Eastman told me I could have the ranch on September 30th on those terms if Bartholomew left. I saw Bartholomew the next morning after his lease had expired. I went out to his ranch and saw him there. It was understood that I was to have the ranch, and his lease had expired, and we were to go to Mr. Eastman to prepare for the signing of a new lease. Bartholomew did not seem very much interested in how much he got—it was to go to his creditors. I told him that \$4500 was as much as I would be willing to pay out on the deal. I knew I had to pay \$1764.25 to the defendant to get the lease, and all I wanted to pay out on the deal was \$4500. * * * Up to the time when I signed the lease, I had reached no conclusion with Bartholomew as to whether or not I would take the remainder of his property, or what price I would pay for it. * * * At the time of signing the lease we tried to agree and settle it right there but when we saw that we could not agree and it was time to take the lease we agreed that I sign the lease and square with the company and then if we could not agree we would appear before the creditors and sort of let the creditors decide the price that I should pay. * * * When I arrived at Martinelli's store, which is only a short distance from Mr. Eastman's residence, Bartholomew and I talked further about the personal property that was left on the ranch belonging to Bartholomew. The difference between \$4500 and what I had to pay the defendant, \$1764.25, amounted to \$2700 odd, something less than \$2800. Mr. Martinelli took a hand in the discussion about that time. He asked me if I would not make it \$2800, to make it round numbers. I told Mr. Martinelli that I would do so,

and then he drew up the bill of sale" (Trans., pp. 50-53).

"CHARLES W. SLACK

"I am an attorney at law, residing in San Francisco. I am the vice-president and general manager of the defendant company. * * * It has always been a custom of the company to make leases for the term of one year, and these have been renewed from time to time, if the tenants are satisfactory. * * * I had some acquaintance with Bartholomew about 1920, 1921, perhaps 1922, somewhere along there. Previous to the lease from October, 1924, to September 30, 1925, he had a lease of the same property, that is the ranch and the cattle then on the property, in conjunction with another tenant. There was a lease in 1922 to Bartholomew and a man by the name of Rainey. At the expiration of that lease, Rainey, so they told us, sold out to Bartholomew, and another lease was made to Bartholomew that lasted for another year, and then the lease in question about September, 1924, to Bartholomew alone for another year. The lease to Hall, dated October 1, 1925, was prepared by me. It was negotiated by Mr. Eastman, the superintendent of the properties. I fixed the amount of the consideration named in the lease on the basis of \$1464.25, the back rent, which we have been unable to collect from Bartholomew, and the \$300 difference between that sum and the amount specified in the lease as a consideration, was due to the fact that the normal cash rent of the property was and had been for some time \$2500 a year. Hall, by reason of the run-down condition of the property and the loss—missing—of a whole herd of stock, besides other stock, refused to pay more than \$2200. That established for the time being, and for some time in the future, the cash rent of \$2200. Consequently, the difference for one year, to-wit: \$300, was added on, by my insistence, to the cash

consideration which Hall or anybody else would have to pay for getting the lease" (Trans., pp. 57-58).

"I fixed first, the amount of the back rent as the basis for a consideration of giving a lease to Hall or anybody else. Later on when Hall offered the \$2200, then \$300 was added by me to the amount which was then fixed and known for Bartholomew's unpaid rent, making all told \$1764.25" (Trans., p. 58).

"I was familiar, in a general way, with the property that was on the ranch. It would have a great deal more value on the ranch than if removed therefrom. I should say that 50 per cent of the value was in the retention of the property on the ranch, as against the removal of the property from the ranch. The property outside the livestock, the horses and the hogs, would have practically no value, not more than 50 per cent, off the ranch. It had a value in place because the tenant could come in and use it there, and therefore it had a larger value in place than it would have off the ranch" (Trans., pp. 60-61).

"We never, in any other instance, exacted any cash consideration for a lease, because a case of this kind never arose before. The rent had always been paid, even in the other two cases I have mentioned, where tenants were told that when their lease expired, they could not have a renewal. The schedules in Bankruptcy show that the debts of Bartholomew, including our own claim, amounted to about \$9000.00."

It is apparent, from a consideration of the testimony, that the situation was this:

Bartholomew held a year's lease on one of the defendant's ranches at a rental of \$2500 which was

about to expire and which the defendant would not renew. He owned the equipment on the ranch. He owed the defendant \$1464.25 for back rent which he could not pay, and he says they also claimed an additional \$300 from him for loss of stock. He owed about \$9000.00 to creditors. Hall wanted to take the ranch over. It was to his interest to buy Bartholomew's equipment because he could get it cheaper than if he had to install new or other equipment. It was to the interest of Bartholomew to sell to Hall because he would get much more than if he moved the equipment off the ranch and sold elsewhere. The defendant was willing to let Hall have the lease and take over the equipment provided that out of the proceeds the defendant would be paid its old bill against Bartholomew. This, in spite of the fact that Bartholomew was hopelessly insolvent to the knowledge of the defendant's agents. The condition was agreeable to Hall provided he did not have to pay more than \$4500, and to Bartholomew because of the necessities of the case which left him nothing else to do. If he did not consent, he would have to move off the ranch with his equipment for which he would be able to get little or nothing.

Mr. Eastman, the superintendent of the company, was quite frank about it. He told Bartholomew and Hall that Hall could have the lease, and that the deal between Hall and Bartholomew for the sale of the equipment could be consummated, provided that the back bill against Bartholomew for the \$1764.25 was

paid. Judge Slack, an attorney, and defendant's general manager, was more subtle and ingenuous. He said Hall could have the lease provided he paid as a consideration therefor this sum of \$1764.25.

There was no reason whatever for Hall paying any consideration out of his own pocket to secure the lease. All admitted that the ranch was in a run-down condition, and, for this reason, the defendant reduced the rent to Hall to \$2200 from the \$2500 charged Bartholomew. The lease had no value over and above the \$2200 rent, so why should Hall pay an additional sum of \$1764.25? No consideration other than the usual annual rental had ever been exacted before by the defendant from its tenants. So why was it so termed and exacted in this case? Simply to enable the defendant, with its general unsecured claim for \$1764.25, to secure full payment of the same instead of being compelled to accept a pro rata like the other creditors of the same class.

The defendant took advantage of the necessities of Bartholomew, who had to act quickly, and forced him to pay off their bill in preference to other bills. Bartholomew had no choice. If he did not consent to this arrangement, the deal would be off, that is to say, Hall would not get a lease and would not want Bartholomew's equipment, and the latter would have to move it off the ranch and practically junk it.

It made no difference whether Hall paid the whole \$4500 to Bartholomew and Bartholomew then paid

the \$1764.25 to the defendant, or whether, as was actually done, the \$1764.25 was paid direct by Hall to defendant. The effect of the transaction was the same either way, for, as we have seen from *Dean v. Davis*, supra, mere circuity of arrangement will not save a transfer that is otherwise a preference.

We have no quarrel to make with the authorities cited by defendant, in its brief, as to the nature of a voidable preference, that is to say, the property transferred must be property of the bankrupt and his estate must be diminished thereby. There is no question but that is the law. In the case at bar, however, it is plain that the effect of the transaction was to transfer property of the bankrupt—a portion of the proceeds of the sale of his equipment—to the defendant in preference to other creditors. The labelling of the transfer as “consideration for the lease” does not rob it of its real nature, and clever counsel cannot whitewash a preference by the mere use of words.

The only possible theory upon which defendant could maintain its right to retain this money would be that Hall was willing to pay \$1764.25, in addition to the \$2200 yearly rental, in order to obtain a lease for a year, irrespective of whether or not he purchased the equipment from Bartholomew. There is not a word of evidence to support such a theory, and all of the evidence is directly to the contrary. Hall wanted to buy the equipment, but, of course, he did not want the equipment without a lease. He was not willing to

pay as much for a year's lease as Bartholomew did, and a concession was made of \$300 on account of the run-down condition of the ranch, a condition that was admitted by all. Why should Hall pay, as contended by defendant, \$3964.25 to the defendant for the privilege of renting the ranch for a year, when it was in such a run-down condition that the defendant conceded its actual cash rental value for the year was only \$2200, instead of the \$2500 that had been charged Bartholomew? Suppose the sale of the equipment had not been involved, and that all Hall wanted was the lease, Bartholomew to move off the equipment and dispose of it as best he might. Will it be contended for a moment that Hall would have paid \$3964.25, that is to say, the normal cash rental of the place for one year plus the \$1764.25 claimed against Bartholomew, just for a year's lease of the place without the equipment? And yet that is the absurd conclusion that must be reached if we are to decide that the \$1764.25 did not, at least indirectly, come out of Bartholomew's property—his interest in the proceeds of the sale of the equipment. Hall did not care who got the money. He wanted the lease from the defendant and the equipment from Bartholomew. He was willing to pay the defendant \$2200, and no more, for the lease, and \$4500, and no more, for the equipment, and if there was a back bill due from Bartholomew to the defendant to be taken care of, that must come out of the \$4500.

Defendant tried to make it appear at the trial, and contends in its brief, that there was no sale of this

equipment between Bartholomew and Hall until after Hall's new lease had been signed, and he had paid the defendant the \$1764.25 as "consideration for the lease." Counsel for defendant, cleverly caused Hall to make this statement (Trans., p. 51):

"Up to the time when I signed the lease, I had reached no conclusion with Bartholomew as to whether or not I would take the remainder of the property, or what price I would pay for it."

Then counsel, in order to try to make this statement still stronger, asked the following question, which elicited the following answer (Trans., p. 51):

"Q. I think you testified, Mr. Hall, that you and Bartholomew had some talk, either before or after the lease was signed on October 1st, about submitting the proposition of how much should be paid to Bartholomew if you bought the property. You did have such a talk with him, did you?"

"A. At the time of signing the lease we tried to agree and settle it right there but when we saw we could not agree and it was time to take the lease we agreed that I sign the lease and square with the company and then if we could not agree we would appear before the creditors and sort of let the creditors decide the price I should pay."

This, of course, put a different version upon the previous statement of Hall, and was, in a sense, a correction thereof, and more in keeping with the rest of the evidence in the record, particularly that of Bartholomew (Trans., p. 26):

"I went down that morning (Oct. 1st) to Inverness, and I met Mr. Hall and Mr. Eastman

down there. Mr. Eastman asked me to go up to his house with Mr. Hall. We went up there. Mr. Hall asked me if I wanted to give him the place for the money. I told him he might as well have it, I guess, or something like that."

Also that of Eastman (Trans., p. 44):

"On that occasion, at my residence, Hall and Bartholomew left my house to discuss the selling price further. They were discussing it as they left the house."

Trans., p. 47:

"As they left my house, Hall and Bartholomew were discussing the price at which Bartholomew would sell to Hall the equipment that he, Bartholomew, owned. Hall said that he would give Bartholomew what he was asking."

Also that of Hall (Trans., p. 51):

"I saw Bartholomew the next morning, after his lease had expired. I went out to his ranch and saw him there. It was understood that I was to have the ranch, and his lease had expired, and we were to go to Mr. Eastman to prepare for the signing of a new lease. Bartholomew did not seem very much interested in how much he got—it was to go to the creditors. I told him that \$4500 was as much as I would be willing to pay out on the deal. I knew I had to pay \$1764.25 to the defendant to get the lease, and all I wanted to pay out on the deal was \$4500. I told Bartholomew that."

The record shows plainly that, on the morning of October 1st, both before and after the lease was signed, it was understood between Bartholomew and Hall that Hall was to have the equipment and that

the only dispute was how much Hall was to pay for the same. The bill of sale made out and signed at Martinelli's store referred to the "net sum" of \$2800, which clearly meant the surplus left after the payment of the \$1764.25 to the defendant.

Counsel for defendant, on page 25 of its brief, challenge us to show any change in Bartholomew's position, or in his assets, which resulted from the payment by Hall to the defendant of the \$1764.25 and the execution of the lease. We accept this challenge. Bartholomew's assets, that is to say, the proceeds of the sale of the equipment by Bartholomew to Hall for \$4500, were depleted to the extent of \$1764.25 which would have been paid direct by Hall to Bartholomew as a part of the \$4500 purchase price of the equipment, if the defendant had not held up Bartholomew at the point of a gun and made it a condition of the giving of the lease to Hall—if Hall did not get a lease there would be no sale of the equipment—that its back bill of \$1764.25 against Bartholomew be paid out of the proceeds of the sale. All that was coming to the defendant from Hall was the \$2200 year rental specified in the lease. Hall did not owe defendant \$1764.25 as "consideration for the lease" or for any other purpose. The lease had no "consideration" value. In fact, its actual value was less than it was the year previous, when no "consideration" was exacted. And it is a certainty that Hall would not have taken the lease, and paid the \$2200 year rental, and the \$1764.25, making a total of \$3964.25, unless he got the equipment

also, because the lease had no value of itself beyond the year rental price.

Courts cannot permit to be done by indirection what the law forbids to be directly done, and, without regard to form, they consider the purpose and effect of the transaction however devious the ways by which it was accomplished. If a transaction was entered into for the purpose of indirectly evading the provisions of the act and procuring an undue preference to the creditor, it is voidable.

Collier on Bankruptcy, (13th Ed.) p. 1267, and cases cited.

And that is exactly what happened in the case at bar. The other elements of a voidable preference were present, and the fact that the payment was made by Hall to the defendant, instead of first to Bartholomew and then by him to the defendant, does not validate the payment.

“To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuity of arrangement will not avail to save it. A ‘transfer’ includes

‘the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.’

“It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor’s claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors. The ‘accounts receivable’ of the debtor, that is, the amounts owing to him on open account, are, of course, as susceptible of preferential disposition as other property; and if an insolvent debtor arranges to pay a favored creditor through the disposition of such an account, to the depletion of his estate, it must be regarded as equally a preference, whether he procures the payment to be made on his behalf by the debtor in the account—the same to constitute a payment in whole or part of the latter’s debt—or he collects the amount and pays it over to his creditor directly. This implies that, in the former case, the debtor in the account, for the purpose of the preferential payment, is acting as the representative of the insolvent, and is simply complying with the directions of the latter in paying the money to his creditor.”

National Bank of Newport v. National Herkimer County Bank, 225 U. S. 178, 184; 28 Am. B. R. 218; 56 Law. Ed. 1042; 32 Sup. Ct. 633.

The distinction between *In re Pearson*, 95 Fed. 425, cited by counsel for defendant in its brief, and the case at bar, is that in that case there was a sale of a lease that had three years to run and had a value in itself, while in the case at bar no lease was sold. Bartholomew’s lease had run out, and all he had to sell was his equipment. In that case, the purchaser of the lease would have had to pay up the back

rent in order to keep the lease for, otherwise, the landlord could have dispossessed him, and it was immaterial whether this back rent was paid by the bankrupt out of the purchase price or the amount thereof was deducted from the purchase price and paid direct to the landlord. No such situation exists in the case at bar because Bartholomew had no lease to transfer, and the defendant had no hold upon Bartholomew for the unpaid rent except by way of preventing the sale of his equipment until that was paid. In the case cited, the landlord was, in a sense, a secured creditor because he could enforce payment of his claim through the terms of the lease, but in the case at bar the landlord was simply an unsecured creditor as to its claim against Bartholomew because there was no longer any lease for it to work upon.

CONCLUSION.

We have omitted citing many authorities, because we believe that the record speaks for itself in this case, that is to say, that it is apparent the defendant, through the ingenuity of counsel, accomplished a preference by indirection and then tried to whitewash the whole affair under the guise of "consideration" for a lease that had no "consideration" value.

Respectfully submitted,

REUBEN G. HUNT,
Attorney for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

4

EVERETT FRUIT PRODUCTS CO., a Corpora-
tion,

Plaintiff in Error,

vs.

OSCAR HOFFMAN, ELWOOD C. BOOBAR and
FRED S. GREENLEE, Copartners, Doing
Business Under the Firm Name and Style of
HOFFMAN & GREENLEE,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington,
Northern Division.

FILED

DEC 21 1926

F. D. MONCKTON,
CLERK

United States
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For the Ninth Circuit.

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OF RECORD.

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9286.

OSCAR HOFFMAN, ELWOOD C. BOOBAR and FRED S. GREENLEE, Copartners Doing Business Under the Firm Name and Style of "HOFFMAN & GREENLEE,"

Plaintiffs,

vs.

EVERETT FRUIT PRODUCTS CO., a Corporation,

Defendant.

*Page-number appearing at the foot of page of original certified Transcript of Record.

COMPLAINT.

The plaintiffs for cause of action state:

I.

That they are now and were at all times herein-after mentioned copartners doing business under the firm name and style of "Hoffman & Greenlee," with their office and place of business at San Francisco in the State of California, and are now and were at all times herein mentioned residents and citizens of San Francisco in the State of California.

II.

That the defendant is now and was at all times herein mentioned a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Everett, Washington, within the jurisdiction of this court.

III.

On the 6th day of August, 1924, the plaintiffs herein and the defendant entered into a written contract whereby the [2] defendant agreed to sell and the plaintiff agreed to purchase two thousand (2,000) cases, equalling four thousand (4,000) dozen, size 2½ cans, of canned substandard pears at the agreed purchase price of \$2.50 per dozen, less 4% brokerage, to be of the 1924 pack of pears as packed by the defendant, which is a corporation engaged in the canning and sale of fresh fruits and vegetables; the said pears were sold subject to approval of sample and were sold for delivery

F. A. S. Steamer, to be delivered when packed, upon the following terms: 2% 10 days, Net 30 days, sight-draft to accompany bill of lading, a true copy of said contract, together with the terms and conditions thereof, is hereto attached, marked Exhibit "A," and by this reference made a part hereof.

IV.

That on August 11, 1924, the parties hereto entered into another contract wherein the plaintiff agreed to purchase and the defendant agreed to sell an additional three thousand (3,000) cases, constituting six thousand (6,000) dozen, of canned sub-standard pears of the same kind and description as mentioned in the foregoing paragraph, the contract for the purchase of which was in the same terms and conditions and on the same form as the foregoing mentioned contract, hereto attached, marked Exhibit "A," differing therefrom only as to the date thereof, the amount of pears to be sold thereunder, which said contract had this additional condition stated on the face thereof, to wit: subject to *pro rata* delivery.

V.

That the defendant's 1924 pack of pears was ready for delivery on October 1, 1924, but the defendant failed and refused to tender to the plaintiffs or submit samples to the plaintiffs [3] of any of the cases or cans of pears of the quality and kind contracted for in the foregoing contracts, although requested and demanded so to do, to the damage of the plaintiffs herein in the sum of forty (40) cents

per dozen cans or eighty (80) cents per case, making the total damage to the plaintiffs, by reason of the said breach of the said contract by the defendant, the sum of Four Thousand (\$4,000.00) Dollars, no part of which has been paid, although due and payable and demand for the payment of the same has been made.

WHEREFORE, plaintiffs pray judgment against the defendant for the sum of Four Thousand (\$4,000.00) Dollars, together with their costs and disbursements herein expended, and such other and further relief as to the Court may seem proper in the premises.

KERR, McCORD & IVEY,
Attorneys for Plaintiff.

United States of America,
Western District of Washington,
Northern Division,—ss.

J. N. Ivey, being first duly sworn, on oath says: That he is one of the attorneys for the plaintiffs in the above-entitled action, and that he makes this verification for the reason that neither of the plaintiffs are now present within the jurisdiction of this court; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

J. N. IVEY.

Subscribed and sworn to before me this 10th day of February, 1925.

MILLARD P. THOMAS,
Notary Public in and for the State of Washington,
Residing at Seattle. [4]

EXHIBIT "A."

Everett Fruit Products Co. No. 2798

Everett, Washington.

Contract Form

No. 260

SELLS TO

Hoffman Greenlee, Buyer Aug. 6, 1924.
Of San Francisco, Cal. Consign to _____.Goods specified as per
contract on reverse side Distination _____.Walter C. Zinn Co., Bro-
ker, San Francisco,
Cal.Address _____. Time of Shipment
when packed _____
Sign on Reverse Side.

Cases	Dozens	Size	Grade	Variety	Brand	per doz.	Do not use these columns
2000	4000	#2½	Sub. Std.	Pears		\$2.50	

Less 4% Brokerage

1924 pack

subject approval sample

Price F. A. S. Steamer, Everett, Wash.

TERMS: 2% 10 days N/30

S/D-B/L

If for export, 1/2 of 1% swell allowance.

If buyers labels, usual label allowance.

Wood cases.

Buyer's Copy. [5]

FRUIT AND/OR VEGETABLE CONTRACT.

As Per Specifications on Reverse Side.

TERMS OF PAYMENT. Cash less 2%, pay-

able in New York or Seattle exchange when paid within ten days or on receipt of invoice with documents.

MARINE INSURANCE. On all shipments by water to Atlantic Coast or Gulf ports seller to insure for buyer's account and expense to cover buyer's cost with 10% added. English form of contract with 3% particular average on each mark.

CONDITIONS. The prices specified are for goods "Free on Board" at factory. The seller reserves the routing of freight. Goods at risk of buyer from and after shipment although shipped to seller's order.

If seller should be unable to perform all its obligations under this contract by reason of a strike, fire or other circumstances beyond its control, such obligation shall at once terminate and cease.

In case of short pack by reason of which seller is unable to make full delivery of any of the grades specified, it is mutually agreed that deliveries are to be prorated.

Goods to be shipped at seller's discretion as soon as practicable after packing unless otherwise specified.

FRUITS remaining unshipped on December 31st following the date of this contract shall be billed and paid for on that date.

Buyer agrees to pay said invoices on demand or protest draft for invoice value, on presentation, with warehouse receipt attached, and seller agrees to store said goods and insure them in selected insurance companies for buyer's account against loss

or damage by fire for 75 per cent of invoice cost. Buyer to pay one and one-quarter cents per case per month to cover cost of both storage and insurance; fractional months at full rate; charges to accrue from the date of warehouse receipt. Seller reserved the right to move and store said goods at buyer's expense in public warehouses if goods are not ordered out by buyer prior to March 1st following date of billing as above.

SWELLS. Guaranteed to July 1st following packing season. Can markings must be furnished with each report of swelled goods. Seller reserves the right of ordering damaged goods returned, but in case seller directs goods destroyed, swell claim will be paid only upon written statement from food inspector that goods have been destroyed.

GUARANTEE. Seller guarantees goods covered by this contract to conform with the requirements of the National Food and Drugs Act of June 30th, 1906, except seller is relieved from any responsibility for misbranding when goods are not shipped under its labels.

This contract to be binding upon the seller must be confirmed in writing by the seller, who, however, shall not be responsible for the performance thereof, unless a copy properly signed by the buyer is delivered to the seller within 20 days of the date thereof.

ARBITRATION. Any dispute arising as to the proper fulfillment of this contract, to be settled by arbitration, by the regular canned goods and dried fruit arbitration boards, either in the cities of New

York, Chicago, San Francisco, or Portland, unless otherwise mutually agreed upon. If question is as to quality, actual samples to be drawn and submitted to such board as selected, their decision to be binding upon both parties to this contract. Party against whom decision is rendered, shall pay arbitration fees and expenses incurred. If decision is rendered that seller has complied with contract, invoice if unpaid shall become due and payable at once. If decision is rendered against seller, arbitrators shall determine amount of allowance, which amount shall be payable at once. If the arbitrators decide the seller has not shown good faith in making delivery hereunder, the buyer shall be entitled to another tender in full compliance of this contract. No unimportant variation in the execution of this contract shall constitute basis for claim.

Buyer HOFFMAN & GREENLEE.

C. C. BOOBAR.

EVERETT FRUIT PRODUCTS CO.,
Seller.

By F. B. WRIGHT.

Broker _____.

[Endorsed] : Filed Feb. 11, 1925. [6]

UNITED STATES OF AMERICA.

[Title of Court and Cause.]

SUMMONS.

The President of the United States of America,
GREETING:

To the Above-named Defendant: Everett Fruit
Products Co., a Corporation,

YOU ARE HEREBY REQUIRED to appear
in the United States District Court, in and for the
Western District of Washington, Northern Division,
within twenty days after the day of service
of this summons upon you, exclusive of the day of
service, and answer the complaint of the above-
named plaintiffs, now on file in the office of the
Clerk of said court, in the city of Seattle, a copy
of which complaint is herewith delivered to you;
and unless you so appear and answer, the plaintiff
will apply to the Court for the relief demanded in
said complaint.

WITNESS, the Hon. JEREMIAH NETERER,
Judge of said court, this 11th day of February, in
the year of our Lord one thousand nine hundred
and twenty-five, and of our Independence the one
hundred and forty-ninth.

[Seal]

ED. M. LAKIN,
Clerk.

By T. W. Egger,
Deputy Clerk.

KERR, McCORD & IVEY,
Attorneys for Plaintiff.

MARSHAL'S RETURN.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the within summons on the therein named Everett Fruit Produce Co. by handing to and leaving a true and correct copy thereof with Mr. Rebbeack personally at Everett in said District on the 13 day of February, A. D. 1925.

E. B. BENN,
U. S. Marshal.
By John Rock,
Deputy.

[Endorsed] : Filed Feb. 14, 1925. [7]

[Title of Court and Cause.]

ANSWER.

Comes now the above-named defendant and in answer to the complaint of the plaintiffs herein, admits, denies and alleges as follows:

I.

Answering Paragraph V of said complaint, the defendant denies that the defendant failed or refused to deliver to the plaintiffs or submit samples to the plaintiffs of any of the cases or cans of pears of the quality and kind contracted for in the contracts referred to in said complaint, and denies that the plaintiffs were damaged in the sum of Forty

Cents (40¢) per dozen cans and denies that the plaintiffs were damaged in the sum of Eighty Cents (80¢) per case, and denies that the plaintiffs were damaged in any sum per dozen cans or per case, and denies that the plaintiffs were damaged in the sum of Four Thousand Dollars (\$4,000.00), and denies that the plaintiffs were damaged in any sum, and denies that any sum is due the plaintiffs by the defendant under said contracts.

FOR A FIRST AFFIRMATIVE DEFENSE to the alleged cause of action set forth in the complaint herein, defendant alleges as follows: [8]

I.

That it is and was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business at Everett, Snohomish County, Washington; that it is and was at all times herein mentioned engaged in the business of canning and selling fruits and vegetables; that such fruits and vegetables are canned at the plant of the defendant in Everett, Washington; that its products are sold throughout the United States and portions of its products are exported.

II.

That during the season and year of 1924 the said defendant, at its plant in Everett, Washington, canned, among other things, pears of the grade called and designated as "Sub-Standard pears"; that such grade of substandard pears as packed by said defendant was the grade of pears covered by

the agreements set forth and referred to in the complaint herein; that after said grade of pears was so packed by said defendant the said defendant delivered to said plaintiffs samples of such grade of pears and that the said plaintiffs had such grade of pears so packed by said defendant inspected at the plant of the defendant in Everett, Washington; that the said plaintiffs failed and refused to approve such samples and rejected such samples, and the said plaintiffs failed and refused to approve such canned pears as packed by said defendant after such inspection, and failed and refused to accept such pears and the said plaintiffs failed and refused to order from the defendant the delivery of such pears.

WHEREFORE, defendant prays that the complaint of the plaintiffs be dismissed, and that the defendant have and recover from the plaintiffs its costs and disbursements herein to be taxed.

WILLIAMS & DAVIS,
MOORE & HARROUN,
Attorneys for Defendant. [9]

United States of America,
Western District of Washington,
Northern Division,—ss.

A. G. Ribbeck, being first duly sworn, on oath, deposes and says: That he is president of the above-named defendant; that he makes this verification for and on behalf of said defendant; that he has read the above and foregoing answer, knows the contents thereof, and believe the same to be true.

A. G. RIBBECK.

Subscribed and sworn to before me this 10 day of March, 1925.

[Seal] C. M. WILLIAMS,

Notary Public in and for the State of Washington,
Residing at Everett.

Due service of the foregoing answer and receipt of a copy admitted this 10th day of March, 1925.

KERR, McCORD & IVEY,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 11, 1925. [10]

[Title of Court and Cause.]

REPLY.

Comes now the above-named plaintiffs and for reply to the answer of the defendant in the above-entitled cause, state as follows:

I.

They deny each and every allegation in paragraph II of the first affirmative defense as set out in said answer.

WHEREFORE, having fully replied to the answer of the defendant, these plaintiffs pray that they have and recover judgment in accordance with the prayer of their complaint in this action.

KERR, McCORD & IVEY,
Attorneys for Plaintiffs. [10A]

State of Washington,
County of King,—ss.

J. A. Adams, being first duly sworn, on oath says: That he is one of the attorneys for the plaintiffs

in the above-entitled action; that he has read the foregoing reply, knows the contents thereof, and believes the same to be true; that he makes this verification for the reason that neither of the plaintiffs are in the State of Washington.

J. A. ADAMS.

Subscribed and sworn to before me this 16th day of March, 1925.

[Seal]

S. H. KERR,

Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of the within reply and service thereof acknowledged this 16 day of March, 1925.

MOORE & HARROUN,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 17, 1925. [10B]

[Title of Court and Cause.]

TRIAL.

Now on this 3d day of March, 1926, the above defendant comes into open court for trial accompanied by his attorney Ben L. Moore and with Mr. Davis of Williams & Davis present of Everett. Both sides being ready a jury is impanelled and sworn as follows: Robert McCormack, C. E. Ridgeway, W. F. Pierce, H. G. York, John Hedberg, Roy E. Turner, G. A. Ross, Thomas Pattiason, Bertram L. McMullen, Arthur O. Olsen, Frank A. Small, Clyde L. Morris. Depositions of W. C.

Zinn, Oscar Hoffman, Roy L. Pratt, Harry Todd, and W. F. Beesemyer are read to the jury. The Beesmyer deposition is stricken on motion of defendant. Exhibit "C" attached to the depositions Zinn et al. is offered in evidence, and denied. Plaintiff's exhibits numbered 1 and 2 are introduced in evidence. Plaintiff rests. Defendant moves for a nonsuit on the grounds of insufficient evidence. Said motion is denied with exception. Defendant's witnesses Andrew G. Ribbeck and F. B. Wright are sworn and examined. Plaintiff's Exhibit No. 3 is introduced and denied as evidence. Defendant's Exhibit Lettered "A-1" is admitted in evidence. Recess is had until 2 P. M. at which time the trial is resumed pursuant to adjournment with witness Wright on the stand. The cross-examination by the defendant of the witness in the deposition of W. B. Longwell taken on behalf of plaintiff is read to the jury. Defendant's witnesses J. C. Butler and Charles Allen are examined and sworn. Defendant rests. Plaintiff now reads to the jury the deposition of W. B. Longwell on direct examination in rebuttal. Witness in rebuttal F. H. Baxter is sworn and examined. Depositions of John L. Jacobs and R. G. Weston [11] are read to the jury. Plaintiff rests on rebuttal. Witness in surrebuttal F. B. Wright is recalled. Both sides rest. Defendant moves for a directed verdict in favor of defendant. After defendant's argument of the motion, the plaintiff moves for a directed verdict in favor of the plaintiff except as to the amount of damages

which it asks be submitted to the jury. After argument the Court denies the defendant's motion and grants the plaintiff's motion for a directed verdict and submits the case to the jury on the question of damages. Cause is argued to the jury. Jury is instructed by the Court. Exceptions are taken by the defendant. Jury retires for deliberation.

Jury later returns into court and all being present, a verdict is returned and reads as follows: "We, the jury do find in favor of the plaintiffs against the defendant in the sum of \$2,000.00 dollars. C. L. Morris, Foreman." Verdict is ordered filed and judgment ordered accordingly.

Whereupon court stands adjourned.

Journal No. 14 at page 369. [12]

[Title of Court and Cause.]

VERDICT.

We, the jury, do find in favor of the plaintiffs against the defendant in the sum of \$2,000.

C. L. MORRIS,
Foreman.

[Endorsed]: Filed Mar. 3, 1926. [13]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9286.

OSCAR HOFFMAN, ELWOOD C. BOOBAR and FRED S. GREENLEE, Copartners, Doing Business Under the Firm Name and Style of "HOFFMAN & GREENLEE,"

Plaintiffs,

vs.

EVERETT FRUIT PRODUCTS CO., a Corporation,

Defendant.

JUDGMENT.

This cause coming on regularly for trial in the above-entitled court on the 3 day of March, 1926, jury having been impanelled, evidence introduced by each party, the defendant having moved for directed verdict, the plaintiff having joined in the said motion reserving the question of damage for the jury, the Court having heard argument of counsel, having decided in favor of the plaintiff and submitted to the jury the question of damages, jury having returned a verdict in favor of the plaintiff in the sum of \$2,000.00, Court being advised in the premises, it is now.

ORDERED that the plaintiffs, Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, copart-

ners, doing business under the firm name and style of "Hoffman & Greenlee," do have and recover judgment against the defendant, Everett Fruit Products Co., in the sum of Two Thousand (\$2,000.00) Dollars together with interest at the rate of six per cent per annum from March 3, 1926, and that the plaintiff be granted judgment for costs against the defendant in the sum of \$114.50.

Done in open court this 13th day of April, 1926.

EDWARD E. CUSHMAN,

Judge.

Approved as to form.

REAMS & MOORE,
Attys. for Deft.

O. K.—KERR, McCORD & IVEY,
For Ptffs.

[Endorsed]: Apr. 13, 1926. [14]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the above-named defendant, Everett Fruit Products Co., a corporation, by Williams & Davis and Reames & Moore, its attorneys, and moves the Court for an order setting aside the verdict, and the decision and the judgment of the Court heretofore returned, made and entered herein, and granting to the said defendant a new trial of the above-entitled action for the reasons and causes materially affecting the substantial rights of the said defendant, as follows:

1. Insufficiency of the evidence to justify the verdict.
2. Insufficiency of the evidence to justify the decision of the Court finding for the plaintiffs herein.
3. Errors in law occurring at the trial. [15]

INSUFFICIENCY OF THE EVIDENCE.

The particulars wherein the defendant claims that the evidence is insufficient to justify the verdict and the decision of the Court are as follows:

a. The contracts upon which the action herein was based showed upon the fact thereof that the defendants agreed to sell, and the plaintiffs agreed to buy certain substandard pears, subject to approval of sample by the plaintiffs. The evidence showed that samples were furnished by the defendant to the plaintiff at San Francisco, and that some examination was made by the plaintiffs or their assignee at Everett, and further was tendered or offered by the defendant to Mr. Longwell, representative at Everett, but that the plaintiffs did not approve any samples, but, on the contrary, rejected the samples and did not order any pears from the defendant.

b. There was evidence to show that the contracts involved in this action had been assigned to the California Packing Corporation, which is not a party to this action, and that said contracts, under said assignment, were at the time of the trial owned by said California Packing Corporation.

c. There was insufficient evidence to show that the plaintiffs were the owners of the contracts involved in this action, and were entitled to sue thereon.

d. There was no evidence to show the price for which the plaintiffs assigned the contracts in this action to the California Packing Corporation, or the price for which the [16] plaintiffs agreed to sell the pears described in said contracts to said California Packing Corporation, or that the plaintiffs had assigned said contracts, or agreed to sell said pears to said California Packing Corporation for any profit whatsoever. There was insufficient evidence to show that the plaintiffs incurred any liability whatsoever in any sum to the said California Packing Corporation by reason of the failure or omission of the plaintiffs to sell or deliver any pears to said California Packing Corporation, or by the failure or omission of the defendant to deliver any pears to the plaintiffs.

e. The evidence showed that Mr. Longwell, acting for the plaintiff and representing either the plaintiffs or the said California Packing Corporation, or both of them, refused to inspect the defendant's pack of substandard pears in about October, 1924, but that inspection thereof was offered be the defendant at Everett, Washington.

ERRORS IN LAW.

The particular errors in law occurring at the trial, relied upon by the defendant herein, are as follows:

a. The Court erred in denying defendant's motion to strike the following answer of the witness Oscar Hoffman to the following interrogatory:

"If you examined the said pears, state what the examination disclosed as to the grade and quality of said pears."

A. "We cut some of these samples, which disclosed that the goods were so palpably not up to grade that we felt it useless to cut further. These products were soft and mushy and full of holes and unfit for the grade."

[17]

The defendant's said motion was upon the ground that the answer was not responsive and did not state facts, but merely a conclusion of the witness.

b. The Court erred in admitting in evidence, over defendant's objection and exception, the testimony of the witness Longwell for the plaintiffs in rebuttal concerning market price, the objection of the defendant being upon the ground that said testimony was a part of the plaintiffs' case in chief, and not proper rebuttal.

c. The Court erred in admitting in evidence, over the objection and exception of the defendant, the testimony of the witness Frey, who testified for the plaintiffs in rebuttal concerning an examination of samples of pears and condition thereof, and concerning market price, the objection of the defendant being upon the ground that said testimony was properly a part of plaintiff's case in chief, and not proper rebuttal.

d. The Court erred in admitting in evidence, over defendant's objection and exception, the testimony on cross-examination of the witness Wright, concerning a shipment of pears to Powell Brothers of London, the objection of the defendant being upon the ground that the said testimony is *irrelative*, immaterial and not proper cross-examination.

e. The Court erred in admitting in evidence, over the objection and exception of the defendant, the testimony of the witness Weston concerning a shipment of pears to Powell Brothers of London, and the examination of said pears, and the condition thereof in London and in Liverpool, the defendant's objection being upon the ground that said testimony referred to a London shipment and to a matter of compromise, and to a controversy [18] based on examination and inspection in London or Liverpool.

f. The Court erred in denying the defendant's motion for a compulsory nonsuit and its challenge to the sufficiency of the evidence at the conclusion of the plaintiff's case in chief.

g. The Court erred in denying the defendant's motion at the conclusion of the evidence for the direction of a verdict for the defendant.

h. The Court erred in granting the plaintiffs' motion for a directed verdict for the plaintiff.

i. The Court erred in withdrawing the case from the jury, except as to the question of market price, and in reciting the issues in the action. The motion of the defendant was upon specific grounds stated to the Court. The motion of the plaintiffs

was a conditional or qualified motion, inasmuch as the plaintiffs moved for the withdrawal of a part only of the issues from the jury, to wit: all issues except the question of market price; that there was in effect, therefore, no joinder or stipulation for withdrawing the issues from the jury on the part of both plaintiff and defendants.

j. The Court erred in its decision and finding that the agreements involved in this action were binding contracts and not unilateral agreements without consideration or mere option.

k. The Court erred in its decision and finding in effect that the agreements involved in this action were binding contracts, and that thereunder the plaintiffs, so long as they acted in good faith and not from any dishonest purpose, could reject the samples if the samples were not to the plaintiffs' [19] taste or satisfaction.

l. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 1, which reads as follows:

**“DEFENDANT’S REQUESTED INSTRUCTION
No. 1.**

You are instructed if you find from the evidence that the pears purchased from the defendant by the plaintiffs were purchased for the purpose of resale and that the defendant knew that said pears were purchased for the purpose of resale and that said pears were resold by said plaintiffs to the California Packing Company, then you are instructed that the measure of damages in this case is the dif-

ference between the contract price and the price of such resale, and there being no evidence in this case of the resale price, you shall find for the defendant.”

m. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 2, which reads as follows:

**“DEFENDANT'S REQUESTED INSTRUCTION
No. 2.**

You are instructed that under the contract made between the plaintiffs and the defendant for the sale of pears the plaintiff agreed to purchase from the defendant substandard pears of defendant's 1924 pack “subject to the approval of plaintiffs, and if you find from the evidence in this case that the said defendant submitted to the plaintiffs fair samples of its 1924 pack of substandard pears as packed by said defendant and that said plaintiffs failed [20] and refused to approve said samples, then there was no sale and you shall find for the defendant.”

n. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 3, which reads as follows:

**“DEFENDANT'S REQUESTED INSTRUCTION
No. 3.**

You are instructed that under the contract between the said plaintiffs and defendant for the sale of pears as alleged in the complaint herein it is provided that such sale is “subject to approval of sample” and if you find from the evidence in this

case that the defendant submitted to the plaintiffs sample cans of pears and that such samples submitted were of the grade known as "substandard pears" and that the plaintiffs failed and refused to approve such samples so submitted, then there was no sale and you shall find for the defendant."

o. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 4, which reads as follows:

**"DEFENDANT'S REQUESTED INSTRUCTION
No. 4.**

You are instructed that under the contract between the plaintiffs and the defendant the plaintiffs purchased from the defendant pears "subject to approval of sample" and it was the duty of defendant under such contract to submit to the plaintiffs samples of substandard pears of its 1924 pack and the obligation was upon the plaintiffs to approve or reject such samples, and if you find [21] "in this case from the evidence that such contracts as set forth in the complaint herein were assigned to the California Packing Company or that the pears covered by said contract were resold to the California Packing Company and that the plaintiffs delegated to a representative of the California Packing Company the duty to inspect said pears and to reject or approve such pears, then you shall find for the defendant for the reason that said plaintiffs under said contract had no right to delegate the authority to any other person or persons."

p. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 5, which reads as follows:

**"DEFENDANT'S REQUESTED INSTRUCTION
No. 5.**

You are instructed that if you find from the evidence that the defendant submitted to the plaintiffs samples of canned pears which samples could be properly graded according to the grades known and established among the trade in the Pacific Northwest as substandard pears, and that said plaintiffs rejected or refused to approve such samples, then you shall find for the defendant and it makes no difference for the purposes of this instruction whether such substandard pears were good, bad or indifferent so long as they were substandard pears."

q. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 6, which reads as follows: [22]

**"DEFENDANT'S REQUESTED INSTRUCTION
No. 6.**

You are instructed, if you find from the evidence that the plaintiff had made a subsale to the California Packers Corporation, or any other person, of the pears described in the contract in this case between the plaintiff and the defendant, and if you further find that the defendant failed to furnish to the plaintiff samples of substandard pears described in said contract, and if you further find that the plaintiff is entitled to recover damages from the defendant for such failure, then in ascertaining

such damages, you are hereby instructed that if you find that such subsale was made, as hereinabove mentioned, then the plaintiff would not be entitled to recover any more than nominal damages."

r. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 7, which reads as follows:

**"DEFENDANT'S REQUESTED INSTRUCTION
No. 7.**

You are instructed that if you find from the evidence that the contracts between the plaintiff and the defendant have been assigned to the California Packers Corporation or to any person other than the plaintiff, then you shall find for the defendant."

s. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 8, which reads as follows:

**"DEFENDANT'S REQUESTED INSTRUCTION
No. 8.**

You are requested to find for the defendant."

t. The Court erred in instructing the jury to the effect that the only question for the jury's determination was a question of damage.

u. The Court erred in instructing the jury that there was no date fixed for the delivery of the goods described in the contract. [23]

v. The Court erred in instructing the jury in substance and effect that the measure of damages was the difference between the contract price and the market price.

w. The Court erred in instructing the jury to the effect that the time for determining the market price could be taken at a time subsequent to September 12, 1924.

s. The Court erred in instructing the jury that there was no difference, or no substantial difference, in the market price of the goods at different points or localities.

y. The Court erred in instructing the jury to the effect that Mr. Ribbeck's testimony that the market price was about \$2.50 meant that it was \$2.50, or more than that.

WILLIAMS & DAVIS,
REAMES & MOORE,

Attorneys for Defendant.

Copy of the attached motion for new trial received and due service thereof admitted this 26th day of March, 1926.

KERR, McCORD & IVEY,
M. S.

Attorneys for Plaintiffs.

Endorsed (on cover): Order within cover.

[Endorsed]: Filed Mar. 26, 1926.

BOURQUIN, J.

Motion denied. All points made were advanced and determined at the trial.

Aug. 12, 1926.

BOURQUIN, J.

[Endorsed]: Filed Nov. 2, 1926. [24]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

Comes now the above-named defendant, Everett Fruit Products Co., a corporation, by its attorneys, and respectfully shows to the court that heretofore, on the 3d day of March, 1928, the Court directed a verdict against your petitioner and in favor of plaintiff, leaving and submitting to the jury the determination by its verdict of the amount of damages to be recovered by plaintiff, and thereupon the jury which had theretofore been duly impaneled, found a verdict against your petitioner and in favor of the plaintiff in the sum of \$2,000.00, and upon said verdict a final judgment was entered on the 12th day of April, 1926, against your petitioner, which said judgment became effective on the 2d day of November, 1926, upon the entry of the order of the Court denying your petitioner's motion for a new trial which theretofore, in due time, had been duly interposed by your petitioner and considered by the Court. [25]

That in said judgment and in the proceedings had prior and subsequent thereunto in this cause, certain manifest errors were permitted to the prejudice of this defendant, all of which more in detail appear and are specifically set forth in the defendant's assignment of errors, which is filed and submitted with this petition.

Your petitioner, feeling itself aggrieved by the said verdict and judgment entered thereon as afore-

said, herewith petitions this Court for writ of error and for an order permitting it to prosecute said writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under the laws of the United States and under the rules of said court in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and the papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and that an order be made fixing the amount of security to be given by plaintiff in error, conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

WILLIAMS & DAVIS,
REAMES & MOORE,

Attorneys for Petitioner in Error.

(Filed Nov. 10, 1926.) [26]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the above-named defendant, Everett Fruit Products Co., a corporation, in the above numbered and entitled cause, and in connection with

its petition for a writ of error filed herein this day, assigns the following errors which the said Everett Fruit Products Co., a corporation, plaintiff in error, avers occurred on the trial thereof and upon which it relies to reverse the judgment entered herein as appears of record:

I.

The Court erred in denying the defendant's motion to strike the evidence of Oscar Hoffman, a witness on behalf of the plaintiff given by deposition, which evidence and the motion to strike the same in substance as follows:

The witness testified :

"To the best of my recollection it was impossible to purchase 'seconds' or 'sub-standard' pears on either September 12, 1924, or October 18, 1924, in lots such as represented by the contract's Exhibits 'A' and 'A-1.' Small parcels were available at \$2.85 to \$2.90 per dozen at both times, with a [27] gradual hardening market as the year progressed. By a 'hardening market' I mean increased value and increased difficulty in securing supplies.

Mr. MOORE.—(Attorney for defendant):

"Pardon me just a moment. We move to strike the testimony of this witness as to the market price of small lots on the ground that the witness has already testified that there was no market and no market price therefore on lots of this size."

The COURT.—“Well I think his evidence is competent as to small lots furnishing some basis on which the jury might arrive at the value of large lots. The motion will be denied.” Defendant’s exception noted.

II.

The Court erred in the admission of the following evidence offered by the plaintiff on cross-examination of the witness F. B. Wright, a witness for the defendant, which said evidence on cross-examination was objected to by the defendant on the ground that it was irrelevant, immaterial and not proper cross-examination. On cross-examination the said witness testified in substance over the objection of the defendant that the defendant corporation shipped a lot of fruit to London in 1924 and that the defendant had a contract in the fall of 1924 for delivery of substandard pears of the 1924 pack to California Canners Corporation of California.

III.

The Court erred in the admission of the testimony of W. B. Longwell, a witness on behalf of plaintiff, which said testimony [28] was immaterial and was to the following effect:

After I inspected the pears I had a conversation on the loading platform with Mr. Wright. The conversation between Mr. Wright and myself at the place I designated had to do with the quality of pears being packed. I protested to Mr. Wright as to the quality of the pack that they were putting up and told him that it was

not a second pear, but was nothing better than a pie pear.

IV.

The Court erred in the admission of the testimony of W. B. Longwell, a witness on behalf of the plaintiffs, which was offered and admitted in rebuttal after the plaintiffs had rested their case in chief and after the defendant had rested its case in chief, which said testimony was not proper rebuttal testimony and was in effect as follows:

“I am familiar with the market price of this grade of pears in the State of Washington and along the Pacific Coast between the 1st of September and the 8th of October, 1924. The going market price for No. 2½ substandard pears sold at Everett, Washington for fall delivery in the 1924 pack on or about October 1, 1924, was \$2.85 factory or about \$2.90 steamer. After October the price remained about at \$2.85 to \$2.90 level. It was about in September, in the packing season of 1924 that the price reached \$2.85 or \$2.90, that is, the early part of September somewhere around the first to the 5th of September.”

V.

The Court erred in the admission of the testimony of Robert D. Frey, a witness on behalf of the plaintiffs, which was offered and admitted in rebuttal after the plaintiffs had rested their case in chief and after the defendant had rested its case in chief, which said testimony was not proper rebuttal testimony and was in effect as follows: [29]

"I have been engaged for the last eleven years in buying and selling pears and keeping posted on the market and am qualified in determining grades. At the request of the officers of California Canners I made an examination of four samples of No. 2½ cans substandard pears offered by W. C. Zinn to the California Canners. One can cut was evidently not packed as substandard at all but contained a syrup two grades higher and evidently a mistake. The balance were not suitable for the grade, with the exception of one can which was, I should say, just about passable. Taken as a whole, the samples examined were not substandard pears as said term is understood in the trade on the Pacific Coast. My recollection is that the market price for substandard pears on or about September 12, 1924, was in the neighborhood of \$2.80 to \$2.85 F. A. S. steamer Everett, Washington. Between September 12, 1924, and October 18, 1924, the market had advanced probably five to ten cents a dozen. The highest and lowest market value of the said pears between the said dates was \$2.80 and \$2.95.

VI.

The Court erred in the admission of the testimony of R. G. Weston given by deposition and offered on behalf of plaintiff, upon the ground that said testimony referred to a London shipment and to a matter of compromise and a controversy based on examination and inspection in London or Liverpool, which said testimony was to the following effect:

I am associated with Powell Bros. & Company of London in the business of canned goods. In the fall of 1924, Powell Bros. & Company purchased 5000 cases second standards— $2\frac{1}{2}$ second standards, pears, from Dodwell & Company, who acted through Meinrath, Corbaley & Co. from Everett Fruit Products Co. Under that contract deliveries of canned pears were made at London. I examined some of the contents of that shipment for quality. The size of the fruit varied enormously. In several tins we found one or more pears which were so soft that they were in a state of mush. Furthermore, a large number of pears had pieces cut out of them to remove a damaged portion and even some pears had a hole drilled right through them to remove such damaged portion. 1,500 cases were shipped [30] from the Pacific Coast by the steamship "Urania," of which 1,000 cases were landed in London and 500 cases were trans-shipped from London to Liverpool. The remaining 296 cases were shipped from the Pacific Coast by the steamship "London Shipper." The examination of the samples drawn at London, that I made, was in my usual course of business there.

VII.

The Court erred in the admission of the testimony of John L. Jacobs, a witness on behalf of the plaintiff, which was offered and admitted in rebuttal after the plaintiffs had rested their case in chief and after the defendant had rested its case in chief,

which said testimony was not proper rebuttal testimony, and was in effect, as follows:

After giving testimony tending to show his qualifications and knowledge, the witness testified in substance: I was present at the examination of samples, represented to be "Substandard" pears, packed by the Everett Fruit Products Company, submitted by Walter C. Zinn to our company. This examination was held in the office of M. Feibush, in San Francisco, in the presence of Robert Frey of the California Canneries Company, Mr. Feibush and myself. These samples were examined on two dates, on September 15th and September 25, 1924. The samples submitted, in our opinion, were not up to the grade of "Substandard" pears. Most of the samples submitted contained a very large percentage of mushy, soft, broken fruit, which is absolutely unfit to be put into grade of "Substandard" and belongs in the "Pie" grade. Also a considerable number of halves in the samples submitted showed holes right through the center of the pears, making those particular halves unfit for the grade of "Water" pears. The effect of the presence of such fruit in the samples submitted would render the sample unfit for the grade of "Substandard" pears and unacceptable as such.

It is my recollection that the market value of "Substandard" pears about the middle of September, 1924, had advanced very considerably from the market of the prior months of

that year, and was somewhere in the neighborhood of \$2.85 per dozen, F. A. S. steamer, at the Northwest, including Everett, Washington. The market value was thoroughly sustained between the dates of September 12, 1924, and October 18, 1924, and, if anything, was rising slightly. It is my recollection that the market value of No. 2 $\frac{1}{2}$ "substandard" pears, in the Northwest, including Everett, Washington, F. A. S. steamer, between September 12, 1924, and October 18, 1924, was between \$2.85 and \$2.90 per dozen. [31]

VIII.

The Court erred in denying the motion of the defendant, which was interposed at the conclusion of the plaintiffs' testimony in support of their case in chief, by which said motion the defendant challenged the sufficiency of the evidence produced on behalf of plaintiffs to sustain any verdict or judgment and moved the court for its order granting a nonsuit of the plaintiffs' case, for the reasons:

- a. That plaintiffs' testimony failed to show that plaintiffs were the real parties in interest.
- b. That the agreements involved in the case were executory agreements without present consideration, of an optional character, and lacking in mutuality, and of no legal force and effect.
- c. That the plaintiffs' testimony failed to show that any pears were ever ordered by the plaintiffs pursuant to the contract.
- d. That plaintiffs' testimony tended to show a

resale of the pears to another corporation, and did not show any loss or damage to the plaintiffs.

IX.

The Court erred in denying the motion of the defendant for a directed verdict for the defendant, which said motion was interposed at the conclusion of all of the testimony in the case, and was upon the following grounds, to wit:

a. That it appeared from the plaintiffs' testimony that the contract sued upon had been assigned to the California Canneries Association, which was and is the owner of the contract, and that the plaintiff in this cause is not the real party in interest herein.

b. That if the plaintiffs are entitled to recover, the measure of their damages would be the difference between the contract price [32] and the subsale price and would be limited to that, and that there is no evidence of any damage whatsoever suffered by plaintiffs.

c. That the contract sued upon was not supported by any present consideration that it was an unilateral agreement and of no legal binding effect.

X.

The Court erred in granting the motion of the plaintiffs for a directed verdict and withdrawing from the consideration of the jury all questions save that of the amount of damages, for the following reasons:

a. The motion of the plaintiffs was a qualified and conditional motion, which asked for the determination of the jury on the question of damages.

b. That the defendant had submitted and requested the Court to give special instructions on its behalf.

c. There was a disputed issue of fact as to whether the samples furnished conformed to the specifications of the agreements and as to whether the defendant had breached any covenant of the agreement.

XI.

The Court erred in granting the motion of the plaintiff for a directed verdict and in ruling and deciding that plaintiffs were entitled to recover, and directing the jury to return a verdict for the plaintiffs, for the reasons:

a. That the plaintiffs were not the real parties in interest inasmuch as their testimony affirmatively showed that the agreements of purchase of pears had been assigned.

b. The agreements involved in the case were executory agreements [33] without present consideration, of an optional character, and lacking in mutuality and of no legal binding force or effect.

c. The evidence showed that the plaintiffs had never approved any samples and had never ordered any pears, and that there was no breach of the agreements by the defendant.

d. The evidence showed that the defendant had performed whatever covenants of the agreements, if any, it was obliged to perform.

e. The Court reached its decision without considering or determining the fact whether the sam-

ples of pears conformed to the specifications of the agreements.

f. That the testimony failed to show any damage suffered by the plaintiffs, and, therefore, failed to show any right of recovery by the plaintiffs.

XII.

That the Court erred in refusing to give to the jury the defendant's requested instruction No. 1, as follows:

"You are instructed if you find from the evidence that the pears purchased from the defendant by the plaintiffs were purchased for the purpose of resale and that the defendant knew that said pears were purchased for the purpose of resale and that said pears were resold by said plaintiffs to the California Packing Company, then you are instructed that the measure of damages in this case is the difference between the contract price and the price of such resale, and there being no evidence in this case of the resale price, you shall find for the defendant."

XIII.

That the Court erred in refusing to give to the jury the defendant's requested instruction No. 2, as follows:

"You are instructed that under the contract made between the plaintiffs and the defendant for the sale of pears the plaintiffs agreed to purchase from the defendant substandard pears of defendant's 1924 pack 'subject to the approval of plaintiffs,' and if you find from

the evidence in this case that the said defendant submitted to the plaintiffs fair samples of its 1924 pack of substandard pears as packed by said defendant and that said plaintiffs failed and refused to approve said samples, then there was no sale and you shall find for the defendant.” [34]

XIV.

The Court erred in refusing to give to the jury the defendant’s requested instruction No. 3, as follows:

“You are instructed that under the contract between the said plaintiffs and defendant for the sale of pears as alleged in the complaint herein it is provided that such sale is ‘subject to approval of sample’ and if you find from the evidence in this case that the defendant submitted to the plaintiffs sample cans of pears and that such samples submitted were of the grade known as ‘sub-standard pears’ and that the plaintiffs failed and refused to approve such samples so submitted, then there was no sale and you shall find for the defendant.”

XV.

The Court erred in refusing to give to the jury the defendant’s requested instruction No. 4, as follows:

“You are instructed that under the contract between the plaintiffs and the defendant the plaintiffs purchased from the defendant pears ‘subject to approval of sample’ and it was the duty of defendant under such con-

tract to submit to the plaintiffs samples of sub-standard pears of its 1924 pack and the obligation was upon the plaintiffs to approve or reject such samples, and if you find in this case from the evidence that such contracts as set forth in the complaint herein were assigned to the California Packing Company or that the pears covered by said contract were resold to the California Packing Company and that the plaintiffs delegated to a representative of the California Packing Company the duty to inspect said pears and to reject or approve such pears, then you shall find for the defendant for the reason that said plaintiffs under said contract had no right to delegate the authority to any other person or persons."

XVI.

The Court erred in refusing to give to the jury the defendant's requested instruction No. 5, as follows:

"You are instructed that if you find from the evidence that the defendant submitted to the plaintiffs samples of canned pears which samples could be properly graded according to the grades known and established among the trade in the Pacific Northwest as substandard pears, [35] and that said plaintiffs rejected or refused to approve such samples, then you shall find for the defendant and it makes no difference for the purposes of this instruction whether such substandard pears were good,

bad or indifferent so long as they were substandard pears."

XVII.

The Court erred in refusing to give to the jury the defendant's requested instruction No. 6, as follows:

"You are instructed, if you find from the evidence that the plaintiff had made a subsale to the California Packers' Corporation, or any other person, of the pears described in the contracts in this case between the plaintiff and the defendant, and if you further find that the defendant failed to furnish to the plaintiff samples of substandard pears described in said contracts, and if you further find that the plaintiff is entitled to recover damages from the defendant for such failure, then in ascertaining such damages, you are hereby instructed that if you find that such subsale was made, as hereinabove mentioned, then the plaintiff would not be entitled to recover any more than nominal damages."

XVIII.

The Court erred in refusing to give to the jury the defendant's requested instruction No. 7, as follows:

"You are instructed that if you find from the evidence that the contracts between the plaintiff and the defendant have been assigned to the California Packers' Corporation or to any person other than the plaintiff, then you shall find for the defendant."

XIX.

The Court erred in refusing to give to the jury the defendant's requested instruction No. 8, as follows:

"You are requested to find for the defendant." [36]

XX.

The Court erred in giving to the jury the following instruction:

"In this case there is only the question of the amount of the damages which is left to you. The question of who is entitled to recover on the findings and the evidence in this case was a question, as it turns out, for the Court to decide, and the Court decided on these contracts and in view of all the evidence, the plaintiffs are entitled to recover. It is left to you to say how much. At the very least plaintiffs would be entitled to nominal damages, which is one dollar. If, in your honest judgment, the plaintiffs have suffered substantial damages, it will be your duty to allow them whatever amount your judgment is."

XXI.

The Court erred in giving the following instruction to the jury:

"According to the contracts, as I understand them, no definite date of delivery is fixed in them. Consequently, the date of delivery would be any time that in your judgment would be a reasonable time after September 12, 1924, and, consequently, the damages to

which plaintiffs would be entitled would be such as might be the difference in the price that it was to pay to the defendant and the market value of the goods in the same market during that interval of time. That is the rule of damages, the difference between what the buyer was to pay for the goods and what he could restore himself by going into the open market and buying the goods, what price he would have to pay. If the plaintiffs were to pay \$2.50 a dozen for these goods, and if they could in the open market buy the same goods for \$2.50, of course they would not be damaged anything beyond mere nominal damages, which is one dollar, by reason of the breach of the contracts.

On the other hand, if it was necessary for the plaintiffs to pay in the open market \$2.65, \$2.85, or \$2.90 a dozen, the plaintiffs would be damaged the difference between \$2.50 and the \$2.85 or \$2.90 they would have to pay on the open market."

XXII.

The Court erred in giving the following instruction to the jury:

"Now, what was the market value, of course, is an issue for you to decide. For when you once determine what [37] the market value is, you simply deduct from that the price that the plaintiffs were to pay, which will give you the amount of damage on each dozen. Mr. Hoffman, a member of the partnership, testi-

fied that at that time, September 12th to October 18, 1924, the price of like goods on the Pacific Coast—these goods are shipped by freight, and perhaps the price in one place would not be very much different from another—was \$2.65 or \$2.90 a dozen, which would be thirty-five or forty cents above the price that Hoffman and Greenlee were to pay to the defendants for the goods."

XXIII.

The Court erred in giving the following instructions to the jury:

"The defendant presented in its behalf, the testimony of Mr. Ribbeck, a member of the company, who testified that in September, 1924, the price was about \$2.50 a dozen. How much more he does not say. From the standpoint that he is an interested party, you can draw the conclusion—though you are not bound to—that he did not mean anything less than \$2.50. In other words, in the case of all interested witnesses you may consider whether they are not apt to draw the testimony just as favorably to themselves as they can, and, of course, as they deem it consistent with their oath. That would apply also to Mr. Hoffman and his testimony of \$2.85 or \$2.90 a dozen. Mr. Wright, also associated with the defendant, testified that the price during that time, September and October, and even to the first *if* 1925, was \$2.50, and the highest was \$2.65 a dozen cans. That at the very least is \$2.65, which would be fifteen cents

more than the plaintiffs were required to pay the defendant for the goods."

XXIV.

The Court erred in receiving the verdict of the jury, which was contrary to the law and the evidence.

XXV.

The Court erred in entering judgment against the defendant.

XXVI.

The Court erred in overruling the motion of the defendant for a new trial. [38]

WHEREFORE, plaintiff in error prays that the judgment of said Court be reversed.

WILLIAMS & DAVIS,
REAMES & MOORE,

Attorneys for Plaintiff in Error.

Service of the within and foregoing petition for writ of error and assignments of error and receipt of a true and correct copy thereof are hereby admitted this 10 day of November, 1926.

KERR, McCORD & IVEY,
Attorneys for Plaintiffs, Oscar Hoffman, Elwood C.

Boobar and Fred S. Greenlee, Copartners Doing Business Under the Firm Name and Style of "Hoffman & Greenlee."

[Endorsed]: Filed Nov. 10, 1926. [39]

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR.

On this 10th day of November, 1926, came the defendant by its attorneys and filed herein and presented to the Court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals of the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises herein.

On consideration whereof, IT IS BY THE COURT HEREBY ORDERED that the writ of error prayed for be, and the same hereby is, granted and allowed, and that upon said plaintiff in error giving bond in the sum of Three Thousand Dollars, conditioned as the law directs, that all further proceedings in said cause be, and hereby are stayed and suspended until the determination of said writ of error by the Circuit Court of Appeals.

Done in open court this 10 day of November, 1926.

JEREMIAH NETERER,
Judge. [40]

[Endorsed]: Filed Nov. 10, 1926. [41]

[Title of Court and Cause.]

WRIT OF ERROR AND SUPERSEDEAS
BOND.

KNOW ALL MEN BY THESE PRESENTS:

That we, Everett Fruit Products Company, a corporation, as principal, and the American Surety Company of New York, a corporation organized under the laws of the State of New York and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, copartners doing business under the firm name and style of "Hoffman & Greenlee," the defendants in error, in the full and just sum of Three Thousand Dollars, to be paid to the said Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, copartners doing business under the firm name and style of "Hoffman & Greenlee," their attorneys, successors, administrators, executors, or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors, and administrators, jointly and severally by these presents.

Signed and dated this the 10th day of November, 1926. [42]

WHEREAS, lately at a regular term of the District Court of the United States for the Western District of Washington, Northern Division, sitting at Seattle, Washington, in said District, in a suit

pending in said court between Oscar Hoffman, Elwood C. Boobar, and Fred S. Greenlee, copartners doing business under the firm name and style of "Hoffman & Greenlee," as plaintiffs, and Everett Fruit Products Company, a corporation, as defendant, Cause No. 9286, on the law docket of said court, final judgment was rendered against the said Everett Fruit Products Company, a corporation, for the sum of Two Thousand Dollars (\$2,000.00), with interest thereon, and the said Everett Fruit Products Company, a corporation, has obtained a writ of error, and filed a copy thereof in the Clerk's office of the said court to reverse the judgment of the said Court in the aforesaid suit and a citation directed to the said Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, copartners doing business under the firm name and style of "Hoffman & Greenlee," defendants in error, citing them to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, according to law, within thirty days from the date hereof;

Now the condition of the above obligation is such that if the said Everett Fruit Products Company, a corporation, shall prosecute its writ of error to effect and answer all damages and costs, if it fails

to make its plea good, then the above obligation to be good, else to remain in full force and virtue.

EVERETT FRUIT PRODUCTS CO.

By BEN L. MOORE,

Its Attorneys.

AMERICAN SURETY COMPANY OF
NEW YORK.

[Seal] Attest: By R. H. MELROSE,
Resident Vice-president.

E. F. KIDD,

Resident Assistant Secretary.

Approved.

NETERER,
Judge.

11-10-26. [43]

The within and foregoing bond hereby approved
this — day of November, 1926.

United States Judge for the Western District of
Washington.

[Endorsed]: Filed Nov. 10, 1926. [44]

[Title of Court and Cause.]

STIPULATION AND ORDER EXTENDING
TIME TO AND INCLUDING MARCH 22,
1926, TO PREPARE AND FILE BILL OF
EXCEPTIONS.

Good cause appearing therefor;

IT IS ORDERED, upon stipulation of counsel,
that the defendant, Everett Fruit Products Co., a

corporation, may have and take until and including March 22, 1926, in which to prepare, submit, and file herein its bill of exceptions.

Done in chambers this 13 day of March, 1926.

BOURQUIN,
Judge.

Approved March 12, 1926.

KERR, McCORD & IVEY,
Attorneys for Plaintiff.

WILLIAMS & DAVIS,
REAMES & MOORE,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 13, 1926. [45]

[Title of Court and Cause.]

DEFENDANT'S BILL OF EXCEPTIONS.

BE IT REMEMBERED that the above-entitled cause came on for trial on the 3d day of March, 1926, before the Honorable George M. Bourquin, District Judge, and a jury duly empaneled and sworn according to law, the plaintiffs appearing by their attorneys Messrs. Kerr, McCord & Ivey, and the defendant appearing by its attorneys Messrs. Williams & Davis and Messrs. Reames & Moore. After the empaneling of the jury, all of the jurors being in the jury-box, the following proceedings were had:

The plaintiffs, to sustain the issue upon their part, offered the testimony of the following witnesses as their evidence in chief.

DEPOSITION OF W. C. ZINN, FOR PLAINTIFFS.

The plaintiffs offered and read in testimony the deposition of W. C. ZINN, who testified as follows:

[46]

My name is W. C. Zinn, I am thirty-nine years old, the place of my business is at 112 Market Street, and my present occupation is manufacturer's agent, dealing in groceries. And my occupation from August 1, 1924, to the present time was salesman.

Interrogatory. "State whether or not in the month of August, 1924, you had any transaction with Hoffman & Greenlee with reference to purchase by the latter of second or substandard pears from the Everett Fruit Products Company and for whom you were employed in said transaction."

Answer. "I do not recall the date, but about that time I was employed by the Walter C. Zinn Company, to offer them for the account of the Everett Fruit Products Company."

My relation to Walter C. Zinn Company, described in the contracts marked and identified as Exhibit "A" and Exhibit "A-1" attached to the deposition of Oscar Hoffman, is that of Manager. I received from the Everett Fruit Products Co. samples of canned substandard pears for inspection under said contracts. I do not remember the number of cans or the dates. It is evident that it must have been the first part of September, 1924, in view

of these telegrams (referring to telegrams consulted by the witness). I received them at 112 Market Street, San Francisco, California. The cans were given to Hoffman & Greenlee. I identified as Exhibit "E" copy of telegram sent September 12, 1924. Said telegram was admitted in evidence, and reads as follows:

EXHIBIT "E."

"September 12, 1924.

Everett Fruit Products Co.,
Everett, Wash.

You evidently sent wrong samples substandard pears cut very poor pieces and soft should have gone into pie cut sample your last years substandard and [47] cut very good nothing like this lot rush further samples.

WALTER C. ZINN COMPANY, INC.

Charge our account."

(The following appears written in pencil at the bottom of said Exhibit "E":

"Above suggested by Mr. Hofman when in office. Mentioned last year to give more weight on above and obtain pears to meet buyers approval. We did not cut last year's sample because we had none.")

"The said telegram of September 12, 1924, was suggested by Mr. Hoffman, witnessed by my stenographer, and the last part of the telegram, stating that last year's "Substandards" cut very good, and nothing like this lot—the reason I mentioned this was to give, what Mr.

Hoffman suggested, more weight, and that we did not cut any last year's or previous year's samples as we had none."

The pencil writing at the bottom of the telegram I just put on there yesterday. I handed the Notary as part of the same exhibit to be marked Plaintiffs' Exhibit "E-1" an original telegram dated September 28, 1924, reading as follows:

PLAINTIFFS' EXHIBIT "E-1."

"Everett, Wn., Sep. 28.

Walter C. Zinn Co.,

San Francisco.

Substandards same grade we always packed being accepted by other buyers California Canners representative here examined pears first of season was informed by Wright that was quality we going put into substandards positively refuse arbitrate buyer must accept or reject nothing else offer our pack standards eighteen per cent sales wish ship London boat thirtieth and want your acceptance or rejection to-morrow.

EVERETT FRUIT PRODS. CO."

I also hand the Notary copy of a telegram dated September 27, 1924, to be marked Plaintiffs' Exhibit "E-2," which said telegram reads, as follows:

[48]

PLAINTIFFS' EXHIBIT "E-2."

"September 27, 1924.

Everett Fruit Products Co.,

Everett, Wash.

California Canneries and Hoffman claims you have made no tender under contract which calls for

Substandard quality considers samples only water grade in second syrup demands arbitration in usual manner advise using Canners League of California for this service.

Collect WALTER C. ZINN COMPANY, INC."

I do not remember whether Hoffman & Greenlee were furnished with copies of said telegrams, or were advised of the contents thereof prior or subsequent to the times that they were transmitted or received.

DEPOSITION OF OSCAR HOFFMAN, FOR PLAINTIFFS.

The plaintiffs then offered and read in evidence the deposition of OSCAR HOFFMAN, who testified as follows:

My name is Oscar Hoffman, my age fifty-five years, my place of business address 112 Market Street, San Francisco, California, my present occupation is that of food broker and I was a food broker on August 1, 1924, and have been such up to and including the present time. I am senior partner in a copartnership known as "Hoffman & Greenlee." The names of the other members of the firm are Elwood C. Boobar and Frederick S. Greenlee. I have never been engaged in manufacturing canned fruits, but I have been engaged in dealing in them since 1898 during which time I dealt considerably in canned pears, and have had numerous occasions to examine all grades of pears, and other canned fruits. In buying and selling canned fruits, particularly pears, it is often necessary for [49] me

as a broker to examine and pass upon quality. In addition to this I am examiner for a very substantial firm of English buyers, who are willing to accept my judgment as to whether or not they should accept, as being up to grade, the canned fruits which they purchase in this market. In addition hereto, I was employed by the Canners League of California, during the war period, to act on behalf of the British Army and Navy Canteen Board, and to examine the packs of the various canners which had been allotted to the British Army and Navy Canteen Board. These allotments were in the nature of commandeers by the United States Government. And in such capacity I, personally, examined samples representing hundreds of thousands of cases. Canned pears are sold at varying prices and grades, and there are established trade designations and names for different grades and qualities of canned pears. The names of these grades and qualities generally known on the market of the Pacific Coast, including Everett, Washington, of canned pears are as follows: "Fancy," "Choice," "Standard," "Seconds," "Water" and "Pie." In the territories of Oregon and Washington "Second" pears are sometimes known and designated as "Substandards." I heard Mr. Feibush testify as to the characteristics and necessary requirements of these various grades and I concur in his testimony on that point. Canned pears sold as "Substandard" pears are known on the Pacific Coast, including Everett, Washington, as pears of a definite grade and quality. The quality and char-

acteristics of canned substandard pears are, as follows: Substandard pears should be packed in a 10% syrup going into the can, fruit to be tolerably free from blemishes and tolerably uniform in size with no size limits [50] of the fruit going into tins. I hereby produce for identification to be marked as Exhibits "A" and "A-1" two written contracts, the first dated August 6, 1924, covering 2,000 cases of canned Substandard pears, the second dated August 11, 1924, covering 3,000 cases of canned substandard pears for sale by the Everett Fruit Products Company to Hoffman & Greenlee, and state that these are the original contracts signed by my firm and delivered to me, through Mr. Zinn, by the Everett Fruit Products Company. Said Exhibit "A" reads as follows:

EXHIBIT "A."

(Face of Contract.)

"Everett Fruit Products Co..

Everett, Washington.

Contract Form.

No. 2798

No. 260.

SELLS TO

Aug. 6, 1924.

Hoffman Greenlee, Buyer Consign to _____
of San Francisco, Cal.

Goods specified as per Destination _____
contract on reverse side.

Walter C. Zinn Co.,

Routing _____

Broker.

Time of Shipment

Address San Francisco,
Cal.

when packed

Sign on Reverse Side.

Sign on reverse side.

1M	10-12-23	E. P. Co.-27547						
Cases	Dozens	Size	Grade	Variety	Brand	Price per Doz.	Do not	
2000	4000	#2½	Sub. Std.	Pears		\$2.50	Use these	Columns.

Less 4% Brokerage.

1924 pack subject approval sample.

Price F. A. S. Steamer, Everett, Wash.

TERMS: 2% 10 days N/30.

S/D-B/L.

If for export, $\frac{1}{2}$ of 1% swell allowance.

If buyers labels, usual label allowance.

Woodcases.

Buyer's Copy. [51]

(The following appears on the back of the contract.)

“FRUIT and VEGETABLE CONTRACT.

or

As per Specifications on Reverse Side.

TERMS OF PAYMENT. Cash less 2%, payable in New York or Seattle exchange when paid within ten days or on receipt of invoice with documents.

MARINE INSURANCE. On all shipments by water to Atlantic Coast or Gulf ports to insure for buyer's account and expense to cover buyer's cost with 10% added. English form of contract with 3% particular average on each mark.

CONDITIONS. The prices specified are for goods "Free on Board" at factory. The seller reserves the routing of freight. Goods at risk of buyer from and after shipment although shipped to seller's order.

If seller should be unable to perform all its obligations under this contract by reason of a strike,

fire or other circumstances beyond its control, such obligations shall at once terminate and cease.

In case of short pack by reason of which seller is unable to make full delivery of any of the grade specified, it is mutually agreed that deliveries are to be prorated.

GOODS TO BE SHIPPED AT SELLER'S DISCRETION AS SOON AS PRACTICABLE AFTER PACKING UNLESS OTHERWISE SPECIFIED.

FRUITS remaining unshipped on December 31st following the date of this contract shall be billed and paid for on that date.

Buyer agrees to pay said invoices on demand or protest draft for invoice value, on presentation, with warehouse receipt attached, and seller agrees to store said goods and insure them in selected Insurance Companies for buyer's account against loss or damage by fire for 75 per cent of invoice cost. Buyer to pay one and one-quarter cents per case per month to cover cost of both storage and insurance; fractional months at full rate; charges to accrue from the date of warehouse receipt. Seller reserves the right to move and store said goods at buyer's expense in public warehouses if goods are not ordered out by buyer prior to March 1st following date of billing as above.

SWELLS. Guaranteed to July 1st following packing season. Can markings must be furnished with each report of swelled goods. Seller reserves the right of ordering damaged goods returned, but in case seller directs goods destroyed, swell claim

will be paid only upon written statement from food inspector that goods have been destroyed. [52]

GUARANTEE. Seller guarantees goods covered by this contract to conform with the requirements of the National Food and Drugs Act of June 30th, 1906, except seller is relieved from any responsibility for misbranding when goods are not shipped under its labels.

This contract to be binding upon the seller must be confirmed in writing by the seller, who, however, shall not be responsible for the performance thereof, unless a copy properly signed by the buyer is delivered to the seller within 20 days of the date thereof.

ARBITRATION. Any dispute arising as to the proper fulfillment of this contract, to be settled by arbitration, by the regular canned goods and dried fruit arbitration boards, either in the cities of New York, Chicago, San Francisco, or Portland, unless otherwise mutually agreed upon. If question is as to quality, actual samples to be drawn and submitted to such board as selected, their decision to be binding upon both parties to this contract. Party against whom decision is rendered, shall pay arbitration fees and expenses incurred. If decision is rendered that seller has complied with contract, invoice if unpaid shall become due and payable at once. If decision is rendered against seller, arbitrators shall determine amount of allowance, which amount shall be payable at once. If the arbitrators decide the seller has not shown good faith in making delivery hereunder, the buyer shall be entitled to another tender in full compliance of this contract.

No unimportant variation in the execution of this contract shall constitute basis for claim.

Buyer HOFFMAN & GREENLEE.

E. C. BOOBAR.

EVERETT FRUIT PRODUCTS CO., Seller.

Broker _____. By F. B. WRIGHT.

Said Exhibit "A-1" reads as follows:

EXHIBIT "A-1."

(Face of Contract.)

"Everett Fruit Products Co.,

Everett, Washington. No. 2809

Contract Form.

No. 269.

SELLS TO Aug. 11, 1924.

Hoffman & Greenlee, Consign to _____

Buyer.

of San Francisco, Cal.

Goods specified as per Destination _____
contract on reverse side. Routing _____

Walter C. Zinn Co., Inc., Time of Shipment
Broker. when packed

Address San Francisco,
Cal.

Sign on Reverse Side.

1M 10-12-23 E. P. Co.-27547

Cases	Dozens	Size	Grade	Variety	Brand	Price per Doz.	Do not use these Columns
3000	6000	# $2\frac{1}{2}$	Sub. Std.	Pears	Bartlett	\$2.50	

less 4% Bkg.

1924 pack

Price F. A. S. Steamer, Everett, Wash.

TERMS: 2% 10 days N/30

S/D-B/L

subject approval sample before
shipment

buyers option labels, less
usual label allowance.

subject to pro rata delivery

Buyer's Copy.

(The back of Exhibit "A-1" is identical with the back of Exhibit "A" as hereinabove set forth down to and excluding the signature. The signature on the back of Exhibit "A-1" appears as follows:

Buyer HOFFMAN & GREENLEE
EVERETT FRUIT PRODUCTS CO., Seller,
By F. B. WRIGHT)

Interrogatory: "State whether or not you received from the Everett Fruit Products Company samples of canned sub-standard pears for inspection. If you answer this interrogatory in the affirmative, state when and where you received the samples and the number of cans received."

Answer: "The Everett Fruit Products Company sent samples to Walter C. Zinn & Company, and, at the request of Mr. Winn, I went to his

office to examine the samples. I remember absolutely going to Mr. Zinn's office, at his request, and examining the samples there.

This was on September 12, 1924." [54]

These samples were examined in the office of Walter C. Zinn Company, and I do not recall that there was anyone present outside of Mr. Zinn and myself and the stenographer. Later in the day I took some of these unopened samples over to the California Packing Corporation and cut them in the presence of Mr. Pratt and Mr. Dodd, and found the quality identical with those that had been cut in the office of Mr. Zinn.

Interrog. 11. "If you examined the said pears, state what the examination disclosed as to the grade and quality of said pears."

Answer. "We cut some of these samples, which disclosed that the goods were so palpably not up to grade that we felt it useless to cut further. These products were soft and mushy and full of holes and unfit for the grade."

Mr. MOORE.—"May it please the Court, we move to strike that answer of the witness on the ground it is not responsive and does not state facts, merely a conclusion of the witness."

* * * * *

The COURT.—"I think the answer may stand. It is true part of that is in the nature of a conclusion, yet it may stand. The motion will be denied. Objection overruled."

Mr. MOORE.—"Save an exception."

The COURT.—"Let it be noted."

I do not have any of the sample cans submitted which are unopened or the contents of which have been preserved, but I did have one can which I opened with Mr. William Beesemyer, of Los Angeles, who visited me some time shortly after my examination of these pears in Mr. Zinn's office. Mr. Beesemyer is engaged in the same line of work, and had just returned that day from a visit to canneries in Oregon and Washington where he went for the purpose of making an examination of canned pears. Walter C. Zinn conferred with me on or about September 12, 1924. [55] As previously stated, the quality of the fruit was palpably unfit for the grade, so much so that Mr. Zinn dictated, in my presence, a telegram to the Everett Fruit Products Company and furnished me with a copy of the same, which said copy I offer in evidence as Exhibit "G." The Court sustained the objection of the defendant to the introduction of said Exhibit "G.") Mr. Zinn had previously extolled the quality of the fruit packed by the Everett Fruit Products Company, and, to demonstrate that they could and had packed proper quality for the grade, he cut a sample tin of their previous year's pack, taking some from his sample shelf. And the same was of proper quality and grade. The samples were so palpably off that we thought that samples of a poorer grade had been submitted to us in error. Mr. Zinn was very indignant that the Everett Fruit Products Company should send samples of such poor quality, and, personally, dictated the telegram to them, a copy

of which is marked Exhibit "G" (being the above-mentioned Exhibit "G" which was excluded from the evidence).

I have had, during all of the periods which I have mentioned as being connected with the business, personal contact with the market price for "Sub-standard" pears of the character described in the contracts, on the Pacific Coast, in the Northwest as well as in California. To the best of my recollection, it was impossible to purchase "Seconds" or "Sub-standard" pears on either September 12, 1924, or October 18, 1924, in lots such as represented by the contracts Exhibits "A" and "A-1." Small parcels were available at \$2.85 to \$2.90 per dozen, at both times, with a gradual hardening market as the year progressed. By "hardening market," I mean, increased value and increased difficulty in securing supplies. [56]

Mr. MOORE.—"Pardon me just a moment. We move to strike the testimony of this witness as to the market price of small lots on the ground that the witness has already testified that there was no market and no market price, therefore, on lots of this size.

The COURT.—"Well, I think his evidence is competent as to small lots, furnishing some basis on which the jury might arrive at the value of large lots. The motion will be denied."

Defendant's exception noted.

Interrog. 18. "State what the interest of the California Packing Company, a corporation, in the contracts for pears sold under contracts marked

and identified as plaintiff's Exhibits 'A' and 'A-1' is."

Answer: "The California Packing Corporation bought these pears from Hoffman & Greenlee under the same terms and conditions, as far as quality is concerned, under which I purchased them from the Everett Fruit Products Company."

DEPOSITION OF ROY L. PRATT, FOR PLAINTIFFS.

The plaintiffs then offered and read in evidence the deposition of ROY L. PRATT, who testified as follows:

My name is Roy L. Pratt, my age is forty years, my business address is 101 California Street, San Francisco, California, my present occupation is that of sales manager for the California Packing Corporation, and my occupation has been the same from August 1, 1924, to the present time. We have no relationship with Hoffman & Greenlee, except that, at times, we employ them as brokers. I have been engaged in dealing in and manufacturing canned fruits twenty-two years. In my capacity as sales manager, it is my duty to both sell and buy canned fruit as well as to be thoroughly acquainted with all grades, [57] as packed by ourselves and other concerns on the Coast, and to be thoroughly posted as to grades acceptable to the trade. In buying and selling canned fruits, it is part of my duty to personally examine samples, to determine the qualities and correctness of vari-

(Deposition of Roy L. Pratt.)

ous grades handled. Canned pears are sold at varying prices and grades. There are established trade designations and names for the different grades and qualities of canned pears. These are clearly set forth in certain specifications adopted by the Northwest Canners Association and California Canners League. These grades are known to the grade as "Fancy," "Choice," "Standard," "Second" or "Sub-standard," "Water" and "Pie." I heard the description of these grades, as stated by Feibush, and I concur in his description as to what he described for each grade, as it conformed to those specifications adopted and published by the two associations of canners mentioned. Canned pears sold as "Sub-standard" pears are known on the Pacific Coast, including Everett, Washington, as pears of a definite grade and quality. The specifications for "Sub-standard" pears are as follows: No size limits, fruit to be tolerably free from blemishes and tolerably uniform in size, syrup going in 10 degrees.

I examined samples of canned pears received by Hoffman & Greenlee, from the Everett Fruit Products Company, on September 12, 1924, in company with Mr. Oscar Hoffman and Mr. Henry Dodd. These samples were examined in the office of the California Packing Corporation, and several cans were cut and examined in that office. The samples examined showed the fruit to be mushy, overly soft, many pieces broken, and throughout all the samples, pieces were noted that

(Deposition of Roy L. Pratt.)

had been badly mutilated, apparently to cut out worms or other defects. [58]

In my capacity as sales manager of the California Packing Corporation, it is imperative that I be constantly in touch with the market, and all grades of canned pears, including "Sub-standard," and I have been thoroughly in touch with the market and conditions of the market on this grade of pears on the Pacific Coast, during the year 1924. The market on canned pears, on September 12, 1924, was very firm, due to the fact that this particular grade of pears was scarce and difficult to find, no lots of any consequence being available. The price on September 12, 1924, F. A. S. steamer, Pacific Coast ports, including Everett, Washington, was about \$2.90 per dozen. From September 12, 1924, to October 18, 1924, the market continued to rule very firm and "Sub-standard" pears more difficult to obtain. If any price change occurred, it was slightly upward.

Interrog. 14. "State what the interests of the California Packing Company, a corporation, in the contracts for pears sold under contracts marked and identified as Plaintiffs' Exhibits 'A' and 'A-1' are."

Answer. "The interest of the California Packing Corporation in contracts marked Exhibit 'A' and 'A-1' is that the pears represented by these contracts were purchased by the California Packing Corporation from Hoffman & Greenlee."

DEPOSITION OF HENRY DODD, FOR PLAIN-TIFFS.

Plaintiffs offered and read in evidence the deposition of HENRY DODD, who testified as follows:

My name is Henry Dodd, my age fifty-one, my business address 101 California Street, San Francisco, California, my present occupation that of manager of the quality and service department of the California Packing Corporation, and that has [59] been my occupation from August 1, 1924, to the present time. I have no relationship to the copartnership known as "Hoffman & Greenlee." For the last fifteen years, it has been my duty to examine the various packs put up by each of our factories of all kinds of canned foods, which they manufacture, including pears, to determine whether the quality of the pack was up to the proper grade or not. I also, for the same length of time, have examined samples of all canned fruits and vegetables purchased by the California Packing Corporation, and cut several thousand cans, including pears, to determine the quality of the foods. During the packing season the samples of the various packs are examined by me every day, to insure that they are up to the grade for which they were packed. This includes all of our factories, which are packing pears of various grades, including "Sub-standard" which we pack up north, and the "Seconds" which we pack in California. In speaking of my duties for the California Packing

(Deposition of Henry Dodd.)

Corporation, I include the length of time which I have served with the California Packing Corporation and its predecessors, which were engaged in the same business as the California Packing Corporation is at the present time. Canned pears are sold at varying prices and grades. There are established trade designations and names for different grades and qualities of canned pears. Those designations and names are "Fancy," "Choice," "Standard," "Sub-standard" or "Seconds," "Water" and "Pie." I heard Mr. Fiebush testify, giving the requirements and characteristics of each of the grades I have mentioned and I concur with the specifications which he gave. Canned pears sold as "Sub-standard pears" are known on the Pacific Coast, including Everett, Washington, as pears of a [60] definite grade and quality.

The grade "Sub-standard" pears are of the same grade as what is known in California as "Second" pears. The specifications for "Sub-standard" pears are as follows: No size limit, syrup to be of 10 degrees balling going into the cans, fruit to be tolerably free from blemishes and tolerably uniform in size. The degree of syrup and the percentage of syrup are synonymous terms. In company with Oscar Hoffman and R. L. Pratt I made an examination on the 12th of September, 1924, of samples of canned pears received by Hoffman & Greenlee from the Everett Fruit Products Company. I examined the cans in the office of the California Packing Corporation on September 12,

(Deposition of Henry Dodd.)

1924. There were four cans examined. There was hardly a well-formed half in any of the cans. There were a great many broken pieces and pieces badly trimmed where worm marks or other blemishes had been cut out. Several of the pieces in each can were soft and mushy. The syrup in each can was very cloudy, and a little dirty. They were not fit for "Sub-standard" or even "Water" grade, and would not have made a good "Pie" on account of the light fill of fruit in the can. On "Pie" fruit now we pack all solid pack, that is to say, the fruit is supposed to be filled in the can and no water added. Therefore, these cans, showing as they did considerable syrup, would not have been fit for any established grade. My duties do not keep me in touch with the market conditions, and I am unable to say what was the market value of said pears.

DEPOSITION OF W. F. BEESEMYER, FOR PLAINTIFFS.

Plaintiffs offered and read in evidence the deposition of W. F. BESSEMYER, who testified as follows: [61]

My name is W. F. Beesemyer, age thirty-eight, business address 921 Washington Boulevard, Los Angeles, California. My occupation from August 1, 1924, to the present time is that of merchandise broker. I have been acquainted with Mr. Oscar Hoffman, of Hoffman & Greenlee, for some ten years. In reference to experience I have repre-

(Depositiin of W. F. Beesemeyer.)

sented the California Packing Corporation for some fifteen years as well as several other large canners of fruits and vegetables in the State of California. I buy annually in the Pacific northwest large quantities of pears for export. In both of these capacities I examine and am generally familiar with canned goods of all kinds, including pears. It is a part of my business to know, and I do know, the various classifications of packs and all details regarding canned fruits.

Pears from the Pacific Coast are sold according to specific grades and are priced according to grade. I am familiar with the various grades of canned pears. There are established trade designations and names for different grades and qualities of canned pears. The established grades generally known on the Pacific Coast, including Everett, Washington, and the characteristics of each, are as follows: "Fancy," "Choice," "Standard," "Sub-standard," "Water" or "Pie." (The witness stated the specifications and characteristics for each of said grades.) Specifications for "Sub-standard" pears are as follows: no size limits, syrup 10% of sugar when packed, fruit to be palpably free from blemishes and tolerably uniform in size. "Sub-standard" pears are generally known on the Pacific Coast, including Everett, Washington, as "Seconds," the specifications for which are exactly the same as for substandards. In company with Mr. Oscar Hoffman, at the office of Hoffman & Greenlee, [62] I cut a sample of the

(Depositiin of W. F. Beesemeyer.)

pears packed by the Everett Fruit Products Company late in the summer or early in the fall of 1924. This sample was clearly marked with a label showing "Sub-standard." Upon opening the can and making examination, I found the fruit to be extremely poor for the grade; in fact, it looked more like Pie fruit or fruit that should never have been put in a can at all. Some of the pieces were broken in two and others were badly gouged. Two pieces had holes clear through, evidently caused by cutting out worm-holes. This sample was one of the poorest cans of pears I have ever seen, and was in no way up to the grade for which it was intended. The can opened was not "Sub-standard" but the fruit was Pie or worse.

Mr. MOORE.—"At this time we move to strike all of the testimony of Mr. Beesemyer relating to the can examined, upon the ground that the can examined has not been identified as one of the cans sent by the Defendant Company."

The COURT.—"This is the only identification you have?"

Mr. KERR.—"Yes, that is the only one.

The COURT.—"Motion granted. It is not identified as a sample of this particular pack."

Thereafter Mr. Kerr, attorney for plaintiffs, re-offered the deposition of Mr. Beesemyer, saying to the Court, "I call your attention to page 20 of the deposition of Mr. Hoffman, where he says he opened one can with Mr. Beesemyer."

The COURT.—(After examining deposition of

(Depositiin of W. F. Beesemeyer.)

Mr. Hoffman.) "That serves as a connecting link of identification to render the testimony of Mr. Beesemyer permissible. You may produce it now. * * * Gentlemen of the jury, you will understand that at the time the testimony of Mr. Beesemyer was stricken in reference to the examination of one can of samples which Mr. Hoffman testifies was furnished from the defendant, it was stricken because at that time we had overlooked the fact there was sufficient identification of that [63] can. Mr. Hoffman testifies in his deposition that it was one of the cans that he and Beesemyer opened together. Consequently the testimony of Mr. Beesemyer, where he testified the fruit was of poor grade, some broken badly, mushy, and one piece was of Pie quality or worse, should not have been stricken. The motion striking it is set aside and the effect of the testimony is before you for consideration."

Mr. MOORE.—"Save an exception."

The COURT.—"Exception noted."

Thereupon, the plaintiffs rested their case in chief, and so announced to the Court. Immediately upon the plaintiffs resting their case, the following transpired:

Mr. MOORE.—"At this time, may it please your Honor, I desire to make a motion addressed to the Court. Shall we submit it in the presence of the jury?"

The COURT.—"What kind of a motion?"

(Depositiin of W. F. Beesemeyer.)

Mr. MOORE.—“A challenge to the sufficiency of the evidence and motion for nonsuit.”

The COURT.—“This case of Slocum vs. New York Life Insurance, I have not understood; I don’t understand it. They say in the United States District Court there can be no motion for nonsuit granted. I do not agree with that decision as laid down, completely, that when a case is tried to the jury, it must be terminated by the jury. I do not understand that case at all. I cannot entertain the motion for nonsuit. I do not think there is anything in the record for it.”

Mr. MOORE.—“At this time the defendant challenges the sufficiency of the evidence produced on behalf of plaintiffs to sustain any verdict or judgment, and moves the Court for its order granting a nonsuit of plaintiffs’ case.”

The COURT.—“The motion is denied. Proceed with the defense.”

To the ruling of the Court denying the defendant’s challenge to the sufficiency of the plaintiffs’ evidence, and denying defendant’s motion for nonsuit, the defendant duly excepted and the same was duly noted and allowed. [64]

DEFENDANT’S CASE IN CHIEF.

Thereupon, the defendant, to sustain the issue on its part, offered in evidence the testimony of the following witnesses:

TESTIMONY OF HENRY RIBBECK, FOR DEFENDANT.

The defendant offered in evidence the testimony of HENRY RIBBECK, who, being first duly sworn, testified on direct examination, as follows:

My name is Henry Ribbeck. I live at Everett, Washington, am now vice-president and general manager of the defendant, and have held that position for nearly one year. The defendant company is and has been engaged in the business of canning fruits and vegetables, and was engaged in that business in 1924. As my duty with reference to my work in connection with the company, I inspect samples of goods packed or canned by my company,—samples of each day's pack the following morning to verify the quality. I am familiar with the character of goods that have been packed by the company, and familiar with the pack of canned pears that were packed by the company for the season of 1924. I am familiar with the different grades of pears that are packed by canneries in the Pacific northwest. There are six grades, and they are known as fancy, choice, standard, substandard or seconds, water and pie grades. The defendant's exhibit, marked for identification "A-1," sets forth the various grades of pears as packed by the canneries in the Pacific northwest. The Everett Fruit Products Company packed some substandard pears for the season of 1924. I am familiar with the kind of pears that were packed under that grade.

(Testimony of Henry Ribbeck.)

The [65] pears as packed under that grade were uniform throughout the season. Some samples of substandard pears were forwarded to our brokers in San Francisco for Hoffman & Greenlee,—on September 9, 1924, and on September 22, 1924. These samples were selected from our general stock in the warehouse, and were representative of our pack for the season of 1924. On the first shipment of samples, we sent twelve samples, and on the second shipment we sent four samples. The specifications for the substandard grade of pears are that the pieces shall be tolerably uniform, and it shall be such fruit as is not fit for the other higher grades, and shall have a 10 degree syrup. The pack of substandard pears for our company during the season 1924 conformed to those specifications. The pears as so packed were tolerably free from blemishes, and they were tolerably uniform in size. During September of 1925, I examined some samples of substandard pears packed by the Everett Fruit Products Company during the season of 1924 in Seattle. Those samples were opened in September 1925 in the office of Burrington, Case & Gibson, Seattle, Washington. They were samples of seconds or substandard pears packed by the Everett Fruit Products Company in 1924. At the time these samples were opened, there were present Mr. Gibson of that firm, Mr. Charles Allen, and our own two attorneys. At that time four samples were opened and examined. They were samples of our pack of 1924, and were the same kind of sam-

(Testimony of Henry Ribbeck.)

ples that were sent to Zinn & Company of San Francisco.

Q. "Were you familiar with the market price of substandard pears in the Pacific northwest during September of 1924?"

A. "I know about what the value was, yes."

[66]

Q. "What was the market value of substandard pears in September, 1924?"

A. "About \$2.50 per dozen."

Q. "State whether or not there was any increase in that price up to the 12th of September, 1924."

A. "There was not to my knowledge."

On cross-examination the witness, Henry Ribbeck, testified as follows:

Q. "Was there any increase up to October 18th, 1924?"

A. "I am not familiar with the prices beyond September."

My familiarity with the price is not limited to what I have sold, nor what my brokers sold. I got my information as to market price in September, and prior to September, from sales by other brokers that were reported to me. We aim to keep track of the market generally.

Q. "Did you get it through trade reports or anything of that kind?"

A. "Trade reports and conferences with other buyers, brokers and canneries."

After we had sold out our pack, we kept track of the market more or less, but I would not consider

(Testimony of Henry Ribbeck.)
myself qualified to give an opinion during the month of October.

Q. "Didn't you answer that after September 12th you didn't keep track of the market?"

A. "I did not."

Q. "I misunderstood you. So you did keep track of the market up to October 1st?"

A. "I was more or less familiar with the values later in the season."

Q. "Now, you say that you sent samples to Hoffman & Greenlee on September—"

A. "September 9th and 22d." [67]

Q. "Have you any letter from Hoffman & Greenlee in which they acknowledged receipt of the second bunch of samples?"

A. "I don't think Hoffman & Greenlee ever acknowledged them."

We have letters from our brokers, Zinn & Company, saying that the samples were received. When I say that we sent four samples to Hoffman & Greenlee, I mean we sent them to Zinn & Company, our brokers, for delivery to Hoffman & Greenlee. Our broker reported that they delivered them. I have a letter from Zinn & Company reporting that.

(Here plaintiffs' attorney, Mr. Kerr, hands to the witness Plaintiffs' Exhibit marked 3 for identification, being a letter of September 27, 1924, from Zinn & Company to the defendant, attached to which was what purported to be a copy of the

(Testimony of Henry Ribbeck.)

letter dated September 26, 1924, from Hoffman & Greenlee to Zinn & Company,))

Q. "Did you state a few moments ago that that is the letter which acknowledges receipt of four cans of pears sent by you to Zinn & Company on September 22d, 1924?"

A. "Well, it does not specify the number of cans received. It merely acknowledges having inspected samples of seconds,—of the pears received from our company."

It does not refer to whether it was samples sent on September 9th or September 22d.

(Plaintiffs' Exhibit marked 3 for identification, consisting of said letters, was here offered in evidence, and upon the defendant's objection thereto, the objection was sustained.)

TESTIMONY OF F. B. WRIGHT, FOR DEFENDANT.

The defendant then offered in evidence the testimony of F. B. Wright, who, being first duly sworn, testified on direct examination, as follows: [68]

My name is F. B. Wright. I reside at Everett, Washington. I am vice-president and sales manager of the defendant company, Everett Fruit Products Company, and have sustained that relation for seven years. I was connected with the company in the season of 1924, and was familiar with the pack of the company at that time. I am familiar with the different grades of pears as graded by the Northwest Canners' Association.

(Testimony of F. B. Wright.)

The printed pamphlet, marked Defendant's Exhibit "A-1" for identification, shows the grades of pears as fixed by the Northwest Canners' Association, and observed by the trade in buying and selling pears in the northwest. It correctly sets forth the grades.

(Said Exhibit "A-1" was thereupon offered and received in evidence, without objection, and shows the following grades and respective specifications therefor.)

DEFENDANT'S EXHIBIT "A-1."

DESCRIPTION

vs. Oscar Hoffman et al.

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"PEARS Grade	Pieces per No. 2½ Can Count	SYRUP % of sugar when packed	DESCRIPTION
FANCY	Not less than 6, not more than 12 pieces. No single parcel should vary more than 4 pieces per can.	40°	Fruit to be of very fine color, ripe, yet not mushy and free from blemishes, halves uniform in size and very symmetrical.
CHOICE	Not less than 6, not more than 15 pieces. No single parcel should vary more than 5 pieces per can.	30°	Fruit to be of fine color, ripe, yet not mushy and free from blemishes, halves uniform in size and symmetrical.
STANDARD	Not less than 6, not more than 21 pieces. No single parcel should vary more than 6 pieces per can.	20°	Fruit to be of reasonably good color, ripe yet not mushy and reasonably free from blemishes, halves reasonably uniform in size and reasonably symmetrical.
SUB-STANDARD	No size limits	10°	Fruit to be tolerably free from blemishes and tolerably uniform in size.
WATER OR PIE	No size limits.		Wholesome fruits unsuited for above grades. [69]

(Testimony of F. B. Wright.)

I was familiar with the pack of the Everett Fruit Products Company in 1924, and was present at the plant. I was three or four times a day on the floor examining pears. I was examining the pears in the process of their being canned or preserved or put up in cans. They were packed partially under my supervision. The pack of substandards in that year was uniform. The pears packed by our company that fall as substandards were packed in ten degree syrup. They were tolerably free from blemishes, and they were tolerably uniform in size. I was familiar with the samples that were sent to Zinn & Company in September, 1924. Those samples were from our regular substandard pack for that year, and of the same quality and grade as the rest of our substandard pack.

Q. "Was there any inspection made of your substandard pack at your factory by Mr. Longwell in August or September, 1924, or in August, 1924?"

A. "There was a gentleman in there who said that he wanted to see the pears 'that were being packed for Hoffman & Greenlee.'"

Q. "Did he state whether or not he was also representing the California Packers?"

A. "I am quite sure that he did."

He made an inspection at that time. He did not make any statement at that time as to the result of his inspection or his attitude toward the substandard pack, but the house—that is, our broker, Zinn & Company, did write afterwards that they were not exactly satisfied with his report. I was familiar

(Testimony of F. B. Wright.)

with the market price of pears in the Pacific Northwest in the vicinity of Everett free alongside steamer in the fall of 1924, and with the price free on board Everett. The market price f. o. b. Everett of substandard pears on the 12th of [70] September, 1924, was \$2.50 per dozen cans. I know what the market was from the period of September 12th, 1924, on to, say, about October 18th, 1924. I think the highest market price f. o. b. Everett of substandard pears during that period of time, that we had any record of, was \$2.65 per dozen cans. The 1924 pack of substandards was ready for delivery from August 25th on.

The witness F. B. WRIGHT, on cross-examination, testified as follows:

My position with the defendant is that of sales manager. As to other duties, I am also vice-president, and look after the production to a certain extent. In 1924 we had no pears of this grade for sale. My statement that the market price was \$2.50 at that time is based on offers being made to us by other brokers, by brokers who were looking for pears at different times. The brokers were coming to us and offering to buy them at \$2.50. We had none to sell at all. Our pack was sold out. The highest price that I know of that pears went to between September 1st and January 1st was \$2.65. That was an actual sale.

Q. "Now, you say that Mr. Longwell was at your plant in August. Do you remember about what date in August?"

(Testimony of F. B. Wright.)

A. "It was along about the 15th or 20th, in that neighborhood. Now, I want to make myself clear.

I do not know whether that was the gentleman's name or not."

There was some gentleman there at that time, and Mr. Baxter, of the Kelley-Clarke Company here, was with him. Mr. Baxter and Mr. Longwell went through our factory, and I [71] was present during the time. They made no objection to the quality of the goods that were going into our pack.

Upon redirect examination, the witness F. B. WRIGHT testified, as follows:

The same gentleman, who has been referred to as Mr. Longwell and who visited our plant in August, 1924, was back on a visit to our plant in October of that same season.

Q. "At that time did he make any inspection of your pack?"

A. "No, he refused to inspect."

Q. "Did you offer him an inspection?"

A. "I did."

Q. "What did he say, if anything, when he refused to inspect?"

A. "He said that if the pears were no different from those that we had sent samples of there was no use in looking at them."

Q. "Did he then inspect or not?"

A. "He did not."

On September 12, 1924, we did have a stock of substandard pears, but we did not have a stock of

(Testimony of F. B. Wright.)

pears over and above our contract requirements at that time, and that was what I meant by my answer to counsel on cross-examination.

Upon recross-examination, the witness F. B. WRIGHT further testified, as follows:

Q. "You say Mr. Longwell said if the pears were no different than the ones he had examined before or the ones that samples were submitted on, he did not wish to examine?"

A. "He did." [72]

Q. "What did you state to him?"

A. "I told him the pears, that they are in the warehouse and we would be glad to show samples."

Q. "Did you state or did you not state to him that they were the same as the samples that were submitted?"

A. "I told him our pack was practically all the same, and the samples submitted were taken out of the regular second pears."

Q. "Did you or did you not tell him that the samples that were submitted were the same as he would be shown if he examined in October?"

A. "I did."

We had a stock of pears on hand, but had contracts to dispose of all of them. We were shipping out as fast as we could. We had contracts with a number of different parties; some for export, and some for Houston, Texas.

Q. "Did you have contracts with Powell Brothers of London?"

A. "I cannot—"

(Testimony of F. B. Wright.)

Mr. MOORE.—“Objected to as irrelevant, immaterial, and not proper cross-examination.”

Q. “For this grade of fruit?”

The COURT.—“I think he may answer.”

A. “I would have to examine the records to find out just who those sales were made with.”

Q. “Do you not know that your company had a contract to deliver to Powell Brothers five hundred cases of substandard pears at Liverpool and 1296 cases of pears at London?”

Mr. MOORE.—“The same objection, may it please your Honor.”

The COURT.—“The same ruling.”

Mr. MOORE.—“Save an exception.”

A. “I don’t remember of that name. A lot of sales was assigned.” [73]

Q. “Do you know whether Mr. Weston, of Powell Brothers was identified with that sale or contract?”

A. “I don’t.”

Q. “You know that pears from your company were shipped to Liverpool and London in the fall, involving substandard pears of the 1924 pack?”

Mr. MOORE.—“Objected to as irrelevant, immaterial and not proper cross-examination.”

The COURT.—“Of what kind?”

Mr. KERR.—“Of the 1924 pack.”

The COURT.—“He may answer.”

Mr. MOORE.—“Save an exception.”

A. “We shipped a lot of fruit to London in 1924.”

(Testimony of F. B. Wright.)

Q. "You answer the question "Yes" then, do you?"

A. "What was the question."

(Question read.)

A. "I cannot say they were substandard."

Q. "Second pears?"

A. "I would not say; I would not answer that."

I believe we had a contract in the fall of 1924 for delivery of substandard pears of the 1924 pack to California Canners' Corporation of California.

DEPOSITION OF W. B. LONGWELL, FOR DEFENDANT (CROSS-EXAMINATION).

The defendant then offered and read in evidence that portion of the deposition of W. B. Longwell setting forth the cross-examination of the witness, the said deposition having been taken on behalf of the plaintiff, and the direct examination not having been read in evidence in the plaintiffs' case in chief. [74]

The witness W. B. LONGWELL, on cross-examination, testified as follows:

I am employed by California Packing Corporation. There is no relationship whatever existing between the California Packing Corporation and Hoffman & Greenlee, the plaintiffs in this action.

Q. "Had Hoffman & Greenlee assigned to the California Packing Corporation its contract with the Everett Fruit Products Company?"

A. "Yes, sir."

Q. "And the California Packing Corporation be-

(Testimony of F. B. Wright.)

came the owner of those contracts by an assignment, did it?"'

A. "Yes, sir."

Q. "And you, as the agent of the California Packing Corporation, the owner of these contracts, were inspecting these pears?"'

A. "Yes, sir."

Q. "The pears were sold subject to approval of samples, you understood that, didn't you?"'

A. "That is part of the terms of the contract."

Q. "And you, as the authorized agent of the California Packing Corporation, after inspection refused to approve the sample, is that true?"'

A. "No, sir."

Q. "Did you approve the sample?"'

A. "No, sir."

Q. "You inspected them as the agent of the holders of the contract and did not either approve or disapprove the samples?"'

A. "I inspected them after only a three days' run on the pack, and, naturally, no inspection of that kind could be final."

Q. "And then you state that your inspection at the time in August when you were present at the plant of the Everett Fruit Products Company was not final and would have no effect, is that it?" [75]

A. "It would have some effect if the goods tendered on August 20th represented the parcel of goods, but the parcel was not packed at that time."

Q. "And you don't know whether the parcel, as finally packed, was the same as you saw, that were

(Testimony of F. B. Wright.)

being packed at the time that you were at the plant, or not?"

A. "No, sir. From the statement of Mr. Ribbeck and Mr. Butler and Mr. Wright, that the parcel I wanted to inspect on October 9th, was the same as I had looked at on August 20th, I told them that the final passing on those goods would have to be up to the San Francisco office, as I would not assume the responsibility of accepting goods of the kind that I had seen."

Q. "But the samples that you did inspect, when you were there in August, you disapproved of?"

A. "They were not samples of second pears."

Q. "I am not asking you what they were. Will you please answer my question? You disapproved, didn't you, the samples that you inspected there in August?"

A. "There were no samples of second pears submitted to me. They were pie pears, and I told them so."

Q. "Whatever they were, you refused to approve them, did you not?"

A. "There was not a question of approval at stake, at that time."

* * * * *

Q. "You inspected some samples at the plant of the Everett Fruit Products Company in August, 1924, did you not?"

A. "Correct."

Q. "You refused to approve those samples, didn't you?"

(Testimony of F. B. Wright.)

A. "I just got through telling you I would not approve anything that would not represent the parcel."

* * * * *

Q. "Will ask you this question: After your inspection at the plant in August, you refused to approve those samples, regardless of what kind of samples they were?"

A. "Yes, sir." [76]

Q. "And in October you refused to make further inspection, did you not?"

A. "Yes, sir."

TESTIMONY OF J. C. BUTLER, FOR DEFENDANT.

The defendant then offered in evidence the testimony of J. C. BUTLER, who testified as follows:

My name is J. C. Butler. I reside at Everett, Washington; I am engaged in the fruit canning business in connection with Everett Fruit Products Company in the capacity of general superintendent, and was such general superintendent in the season of 1924, and was supervising the packing of pears at that time. In my supervision of the packing I was actually in the plant all the time, and inspected the fruit and inspected it in the process of canning or processing. I inspected the grades. I have been in the canning business about fourteen years, and am familiar with the grades and specifications for the several grades of pears in the Northwest as fixed by the Northwest Canners' Association. I have

(Testimony of J. C. Butler.)

heard those grades and specifications described here in the testimony this morning, which correctly states said grades. I was familiar with the pack of substandard pears in our company, in our plant in 1924. That pack was uniform. The substandard pears were packed in ten degree syrup. The pears of our substandard pack were tolerably free from blemishes, and were tolerably uniform in size. The pears packed by us as substandards were in the substandard grade as fixed by the Northwest Canners' Association.

On cross-examination, the witness **J. C. BUTLER** [77] testified, as follows:

I cannot recall the amount of our pack for 1924. I would have to refer to the records. I don't recall whether it was approximately 70,000 dozen. I would have to refer to the records to state intelligently the amount of our pack of pie pears. I do not recall whether there was approximately 500 dozen pie pears in 1924, and I do not have any idea of the number of water pears put up during the season. I do not recall whether it was less than 100 dozen that was packed during the season. As to the visit of Mr. Longwell in August, 1924, I remember Mr. Baxter's visit at the plant, and some gentleman with him, but I do not know the gentleman's name. I secured samples for them. They saw how the pears were being put up. I don't remember whether they took some of the cans, the tops of which had not been put on, and dumped them out in trays and looked at the pieces.

TESTIMONY OF CHARLES ALLEN, FOR DEFENDANT.

The defendant then offered in evidence the testimony of Mr. CHARLES ALLEN, who testified as follows:

My name is Charles Allen. I reside in Seattle. I am engaged in the business of buying canned fruits and canned foods, in which said business I have been engaged twenty years. I am engaged in business in Seattle. I am familiar with the different grades and specifications of canned pears under the specifications of the Northwest Canners' Association and in the trade. Defendant's Exhibit "A-1," setting forth the grades and specifications for the various grades of canned pears [78] correctly states the grades in this district. In September, 1925, I made an examination and inspection of some canned pears in the city of Seattle, Washington, submitted to me by Mr. Ribbeck of the Everett Fruit Products Company, and by him stated to be their substandards of the 1924 pack. Those pears were tolerably free from blemishes, and were tolerably uniform in size. From my knowledge as an expert, and from my inspection and examination of those pears, I will say that they conformed to the grade known as substandard pears. They were substandard pears. I examined three cans there. I only found one slight blemish—just one piece out of the three cans. The nature of that blemish was that the piece had a worm hole cut out of it.

(Testimony of Charles Allen.)

On cross-examination the witness CHARLES ALLEN testified, as follows:

I found one can with one piece of pear in it with a worm hole cut out, apparently. I have no connection with the defendant company, and the only thing I know about these pears being the 1924 pack is what Mr. Ribbeck stated to me. My recollection is that the cans were marked or identified with the letters "H. G. E."

TESTIMONY OF HENRY RIBBECK, FOR DEFENDANT (RECALLED).

HENRY RIBBECK, on behalf of the defendant, then testified as follows:

Mr. MOORE.—"I would like to ask Mr. Ribbeck what letters or identifying marks identified their pack of substandard pears for the season of 1924."

[79]

* * * * *

A. "H. G. E." represents the 1924 pack of substandard or second pears."

Mr. KERR.—"Were any of them marked "H. G. B.?" A. "No, sir."

Thereupon the defendant rested.

REBUTTAL.

The plaintiff then in rebuttal offered in evidence the testimony of the following witnesses:

DEPOSITION OF W. B. LONGWELL, FOR PLAINTIFFS (RECALLED IN REBUTTAL).

The plaintiff then offered in evidence and read the deposition of W. B. LONGWELL, who testified, as follows:

My name is W. B. Longwell. My address, 101 California Street, San Francisco. My present employment—Western Division Sales Director of the California Packing Corporation. With the exception of one year intervening, I have been with that corporation since it was formed in 1906. The corporation is engaged in the manufacture and sale of canned foods, and does now, and for several years past has dealt in canned pears. My particular duties are the directing of sales in the territory west of the Mississippi River, and in directing the sales I naturally have to keep a close check on the various grades and qualities of goods that we are selling from time to time, and I have performed these duties for about twenty years. In a general way, I am and was familiar with the packing conditions in the State of Washington in October and August of 1924. I made trips through Washington territory about the latter part of [80] August, 1924. I am acquainted with the firm of Hoffman & Greenlee, the plaintiffs in this action. I called

(Deposition of W. B. Longwell.)

at defendant's place of business at Everett about August 20, 1924, for the purpose of familiarizing myself with the pack of pears which they were putting up. While there, I went through the plant and looked at some pears that were being canned at that time. Mr. Butler and Mr. Wright were at the plant at that time representing the defendant, and I talked with them. I made a request of Mr. Butler, who was introduced to me as superintendent of the plant, to see some samples of the second pears which he was packing. Mr. Butler obtained some samples of the second pears which he had packed, and submitted them to me. I have a conversation with Mr. Butler, and Mr. Wright, who I believe was one of the managers of the business, was in and out during the conversation. When I went to the plant I believe it was Mr. Butler whom I first saw. I was with Mr. Baxter, and I believe Mr. Baxter introduced me to Mr. Butler. My recollection is that my request for an inspection of the plant and the pack was made to Mr. Butler. It is my impression that Mr. Wright, during the time I was opening cans or inspecting the second pears, only passed by and was not a party to the discussion. After I inspected the pears, I had a conversation on the loading platform with Mr. Wright.

Q. "What was said?"

(The deposition shows the defendant's objection as follows:

Mr. DAVIS.—"We object as immaterial and of

(Deposition of W. B. Longwell.)

no importance in this matter—what was said by the witness or Mr. Wright.”) [81]

Mr. MOORE.—“That objection is renewed, if your Honor please.”

The COURT.—“I think the objection should be sustained.”

Mr. KERR.—“Exception please.”

The COURT.—“It will be noted. Let's see. Was that while he was inspecting the samples, or afterwards?”

Mr. KERR.—“That was while he was inspecting them at the plant.”

The COURT.—“I think it may go in under the principle of *res gestae*. He may answer the question. Objection overruled.”

Exception *save* by the defendant duly noted.

The conversation between Mr. Wright and myself at the place I designated had to do with the quality of pears being packed. I protested to Mr. Wright as to the quality of the pack that they were putting up, and told him that it was not a second pear, but was nothing better than a pie pear. My statement of the quality of the pears to Mr. Wright conformed to what I discovered at that inspection. Substandard is a term that is sometimes applied to second pears, and it is the generally accepted trade theory that they are one and the same thing. When I refer to second pears in any answers, I mean the same as substandard pears. The grade is the same in the trade. In passing through the factory of the defendant company on that day with Mr. But-

(Deposition of W. B. Longwell.)

ler, after cutting the cans in the office, I had quite a discussion with Mr. Butler as to the relative merits, as to what should go into a second and what should not. I cut some cans in the office of the company. The cans were filled with broken pieces of fruit, some of them badly trimmed, and a large part of the contents mushy. I did not make any examination of the syrup that the pears were put up in. We never do and cannot judge of that without resorting to instruments. [82] Mr. Butler was there at that time and selected the cans himself. I asked him for two and a half tin, substandard pear, which I have called seconds. I had a conversation in the presence of Mr. Baxter.

Mr. MOORE.—“We object to that as irrelevant and immaterial.”

The COURT.—“A conversation over this sample that he was examining?”

Mr. KERR.—“Yes.”

The COURT.—“He may answer.”

Mr. MOORE.—“A conversation with Mr. Baxter, who was a representative of the California Packers’ Association, the owners of these contracts, by assignment, and not the representative of the defendant.”

Mr. KERR.—“Mr. Butler was there, too, Mr. Moore.”

Mr. MOORE.—“Save an exception.”

The COURT.—“It will be noted.”

I discussed with Mr. Butler the question of the grading of fruit that should go into seconds, and

(Deposition of W. B. Longwell.)

Butler stated to me that this was their third day's run and he hoped to be able to improve the quality. From the office I went into the packing plant. There with Mr. Butler and Mr. Baxter we took some cans off of the trays, after they had passed from the canning tables, and we laid out the pieces on the trays so as to see just what percentage of broken and other portions of pears that were in the cans were unfit for seconds.

Q. "Was there any conversation at that time between you and Mr. Butler, in Mr. Baxter's presence, with reference to the quality of the materials that you took out of these tins?"

A. "Just a general discussion as to what should go in and what should not go into seconds." [83]

About October 8th or 9th, I called again at the defendant company's place of business in Everett. I did not inspect any canned pears at that time. I had conversation at that time with Mr. Ribbeck that relates to substandard No. 2 $\frac{1}{2}$ canned pears. I do not know what position Mr. Ribbeck holds with the defendant company, but he was in the office there. I stated that I was there to inspect pears in the interest of the California Packing Corporation, that had been purchased from Hoffman & Greenlee, providing that they had samples of a lot of second pears to submit to me. Mr. Ribbeck answered that they had the same lot of pears which I had previously looked at. In reply to that I said that I was not interested in that lot of pears as they were

(Deposition of W. B. Longwell.)

not seconds. I think Mr. Wright and Mr. Butler were there at that time.

Q. "Now, then, Mr. Longwell, are you familiar with the market price—"

Mr. MOORE.—"We object to it on the ground it is not proper rebuttal."

The COURT.—"Well, just to conform to principles, the Court will say it is. Evidence is of two kinds, that which tends to prove the plaintiffs' case and that which tends to rebut the other's case, and the same evidence may serve both purposes. You may read it if you desire."

Mr. MOORE.—"Save an exception."

The COURT.—"It is rebuttal pure and simple."

I am familiar with the market price of this grade of pears in the State of Washington and along the Pacific Coast, say between the first of September, 1924, and October 8th, 1924. I am familiar with the price that was carried through on pears until after the turn of the year. [84]

Q. "What was the market price of this grade of pears, at Everett, Washington, on October 8th, 1924, or about that time?"

Mr. MOORE.—"We renew our objection because there has been no testimony from the defense at all as to the market price on October 8th."

The COURT.—"All periods are covered. One of your witnesses covered it from September to the first of the year. Objection overruled."

Mr. MOORE.—"Save an exception."

The going market price for No. 2½ substandard

(Deposition of W. B. Longwell.)

pears sold at Everett, Washington, for fall delivery, in the 1924 pack, on or about October 1, 1924, was \$2.85 factory or about \$2.90 steamer. After October the price remained about at the \$2.85 to \$2.90 level. It was about in September in the packing season of 1924 that the price reached \$2.85 or \$2.90, that is the early part of September, somewhere around the 1st to the 5th of September. My company had purchased this lot of fruit from Hoffman & Greenlee, and that was the reason I was inspecting them.

On redirect examination the witness W. B. LONGWELL, testified, as follows:

I inspected samples of pears on August 20th. I looked at the samples submitted and looked at the stuff as it was being passed on to the trays, and stated that the quality that was being put in the can was not second pears. This inspection at that time was at our own request. I stated at that time that I was there to get a line-up on what they were doing and what the possible out-turn of the pack would be. In that inspection I did not undertake to reject future delivery of the pears. [85]

TESTIMONY OF F. H. BAXTER, FOR PLAIN-TIFFS.

The plaintiffs offered in evidence the testimony of F. H. BAXTER, who testified as follows:

My name is F. H. Baxter. My occupation vice-president of the Kelly-Clarke Company, Seattle.

(Testimony of F. H. Baxter.)

I am engaged in the merchandise brokerage business. I have dealt in canned pears, and was dealing in canned pears in the summer and fall of 1924. I am familiar with the grades and qualities of canned pears. I recall about August 20, 1924, in company with Mr. Longwell, I visited the plant of the Everett Fruit Products Company at Everett, Washington. I was not there for the purpose of inspecting pears. I merely took Mr. Longwell up for the purpose of inspecting pears. I drove him up in my machine, and went in the plant in company with Mr. Longwell. We met Mr. Butler there. I went out into the packing room where they were packing pears. At that time some pears which Mr. Butler pointed out as being canned as second or substandard pears were examined in my presence.

Q. "What did you find in that examination with reference to the quality of the pears?"

A. "Mr. Longwell said they were not good substandards."

I did not observe this myself to any extent. I was not there for that purpose.

On Cross-examination the witness F. H. BAXTER testified as follows:

Q. "You say Mr. Longwell said they were not good substandards?" A. "Yes." [86]

I have some connection with the California Packer's Company, that is, we are their local agents and have been ever since.

(Testimony of F. H. Baxter.)

On redirect examination the witness F. H. BAXTER testified:

I have sold, as a broker, for the Everett Fruit Products Company.

DEPOSITION OF JOHN L. JACOBS, FOR PLAINTIFFS.

The plaintiff offered and read in evidence the deposition of JOHN L. JACOBS, who testified as follows:

My name is John L. Jacobs, my age is thirty-two years, my business address is California Canneries Company, 600 Minnesota Street, San Francisco, California, my present occupation is manager of the California Canneries Company, and my occupation from August 1, 1924, to the present time has been the same. Eleven years I have been engaged in dealing and manufacturing canned fruit. I have had considerable experience in both buying and selling canned pears and in the examination of the output of two plants for eleven years. In personally examining samples, in the buying and selling of canned pears, and examination of the output of two factories, and manufacturing canned fruits, including pears. Canned pears are sold at varying prices and grades, and there are established grades and qualities known generally on the market on the Pacific Coast, including Everett, Washington, of canned pears. The grades generally known, are, "Fancy," "Choice," "Standard," "Second,"

(Deposition of John L. Jacobs.)

[87] "Water" and "Pie." In Everett, Washington, "Seconds" are called "Substandards." The characteristics and requirements in classifying the grades of pears are covered by the Canners League of California governing California Canneries and the Northwest Canners Association governing packing of pears in the states of Oregon and Washington. These specifications are the same, with the exception that "Second" pears are caddel "Substandard" pears, under the regulations of the Northwest Canners Association. I have listened to the testimony of Mr. Feibush, preceding mine, regarding different characteristics and qualities of these various grades and I concur in the same. Canned "Substandard" pears are packed without size limit, in 10 degree syrup going in, fruit to be tolerably free from blemishes and tolerably uniform in size. As I am the one that gave the order to make the examination, I would state that I was present at the examination of samples, represented to be "Substandard" pears, packed by the Everett Fruit Products Company, submitted by Walter C. Zinn to our company. This examination was held in the office of M. Feibush, at 112 Market Street, San Francisco, and those present were Mr. Robert Frey of the California Canneries Company, Mr. Feibush and myself. These samples were examined on two dates, on September 15th and September 25, 1924.

Interrog. 8.—"State what said examination dis-

(Deposition of John L. Jacobs.)
closed as to the quality, grade and condition of the fruit contained in said samples."

Answer.—“The samples submitted, in our opinion, were not up to the grade of ‘Substandard’ pears.”

Interrog 9.—“State whether or not said samples examined were substandard pears as said term is understood in the trade on the Pacific Coast.”
[88]

Answer.—“They were not ‘Substandard’ pears as such term is understood in the trade.”

Mr. MOORE.—“We move to strike the answer on the ground it is a mere general statement without stating the basis of fact for any expert opinion.”

The COURT.—“The answer will be stricken.”

Most of the samples submitted contained a very large percentage of mushy, soft, broken fruit, which is absolutely unfit to be put into grade of “Substandard” and belongs in the “Pie” grade. Also a considerable number of halves in the sample submitted showed holes right through the center of the pears, making those particular halves unfit for the grade of “Substandard” pears and more fit for the grade of “Water” pears. The effect of the presence of such fruit in the sample submitted would render the sample unfit for the grade of “Substandard” pears and unacceptable as such. I have had the general management of sales for the California Canneries Company for five years, in which connection I was in complete touch with market

(Deposition of John L. Jacobs.)

conditions and price fluctuations of canned pears, including No. 2½ cans, "Substandard" pears, throughout the Pacific Coast, including northwest market conditions. It is my recollection that the market value of "Substandard" pears, about the middle of September, 1924, had advanced very considerably, from the market of the prior months of that year, and was somewhere in the neighborhood of \$2.85 per dozen, F. A. S. steamer, at the northwest, including Everett, Washington. The market value was thoroughly sustained between the dates of September 12, 1924, and October 18, 1924, and, if anything, was rising slightly. It is my recollection that the market value of No. 2½ "Substandard" pears, in the northwest, including [89] Everett, Washington, F. A. S. steamer, between September 12, 1924, and October 18, 1924, was between \$2.85 and \$2.90 per dozen.

The plaintiffs then offered in evidence the deposition of Robert D. Frey, whereupon the defendant objected, as follows:

Mr. MOORE.—"May it please your Honor, we wish the record to show that our same objection runs to all of this testimony on the ground that it is not proper rebuttal."

The COURT.—"It may be entered. Objection overruled."

Mr. MOORE.—"Save an exception."

DEPOSITION OF ROBERT D. FREY, FOR PLAINTIFFS.

Thereupon the plaintiff offered and read in evidence the deposition of ROBERT D. FREY, who testified as follows:

My name is Robert D. Frey, my age thirty-two, the address of my business 600 Minnesota Street, California Canneries Company, my present occupation domestic sales manager of the California Canneries Company, and my occupation from August 1, 1924, to the present time has been the same. I have been engaged in dealing and manufacturing canned fruits about thirteen years, as salesman for the California Canneries Company, eastern manager and domestic sales manager, I have been engaged, at least for the last eleven years, in buying and selling pears and keeping myself posted on the market, and my experience in buying pears has qualified me in determining grades. I was called upon to cut samples and examine them on the basis of the price, both in buying and selling pears, and determine whether or not they were up to grade. Canned pears are sold at varying [90] prices and grades. There are established trade designations and names for difference grades and qualities of canned pears. The grades set by the Canners League of California are "Fancy," "Choice," "Standard," "Seconds," "Water" and "Pie." The grades set by the Northwest Canners Association in which district Everett, Washington, is lo-

(Deposition of Robert D. Frey.)

cated, are the same, with the exception that "Second" pears are designated as "Sub-standard" under their specification. The qualifications, requirements and characteristics of these grades, in both associations, are identical. The grade known as "Seconds" in California being designated as "Sub-standard" by the Northwestern Canners Association. I have heard Mr. Feibush's testimony and concur with his specifications as to the requirements of each particular grade. The following are the quality and characteristics of canned "sub-standard pears": no size limits, put in syrup 10 degrees, fruit to be tolerably free from blemishes, tolerably uniform in size.

At the request of the officers of California Canneries I made an examination of samples of No. 2½ cans substandard pears offered by W. C. Zinn to the California Canneries. The examination was made at the office of Mr. M. Feibush, and there were present besides Mr. Feibush, a Mr. John Jacobs and myself. I personally made a note of the examination made on September 15, 1924, of four cans, at the time of said examination. One can cut was evidently not packed as "Sub-standard" at all, but contained a syrup that was at least two grades higher and evidently a mistake. The balance were not suitable for the grade, with the exception of one can, which was, I should say, just about passable. I would like to offer, for identification, as part of my deposition, this statement which I made at [91] at the time of my examination, and have it marked

(Deposition of Robert D. Frey.)
 for identification as Plaintiff's Exhibit "F."
 (Plaintiff's Exhibit "F" attached to said deposition is in words and figures as follows, to wit:

PLAINTIFF'S EXHIBIT "F."
SAMPLE RECORD.

SIZE TIN—#2½. DATED EXAMINED—9/15/24.
 FRUIT—Pears. VARIETY— —. GRADE—Second.
 SUBMITTED BY—E. PACKER—Everett F. P. Co.
 PACKED—Everett. LABEL—Pilchuck. PLANT ——
 MARK—H. G. E. NUMBER CASES ——.

Total Number	Number Net Pieces	Number Pieces				
Pieces.	Weight.	Lost.	Good.	Syrup.	General	Appearance.
1 10				23°	Suitable for stds—Lot unfit for salad.	
2 15				12° 2	Bkn. O. K. for sec- onds.	
3 About half can	Bkn. pes.			12°	N. G. for anything.	
4 Same.				12°	" "	"
5						
6						

GENERAL REMARKS—Lot doubtful.

Taken as a whole, the samples examined were not "Sub-standard" pears, as said term is understood in the trade on the Pacific Coast. The cans contained too many broken pieces, in fact, two of the cans were nothing but broken pieces, and were discolored, rather brownish, and many of the pieces had holes [92] that had been cut into the pear, either to core out worms or various bad blemishes. The fruit was also very soft and mushy, and we would not pass this lot as "Sub-standard." My ex-

(Deposition of Robert D. Frey.)

perience has been as sales manager and eastern manager, and that has been part of my job, to keep myself posted on market conditions and prices, particularly as affecting the price of No. 2½ cans "Sub-standard" pears, for the last eleven years, and, particularly, during 1924 and throughout the Pacific Coast. My recollection is that the market price for "Sub-standard" pears, on or about September 12, 1924, was in the neighborhood of \$2.80 to \$2.85 F. A. S. steamer, Everett, Washington. Between September 12, 1924, and October 18, 1924, the market had advanced, probably 5 to 10 cents a dozen, by October 18, 1924. The highest and lowest market value of the said pears between the said dates was \$2.80 and \$2.95.

Mr. KERR.—"I will now read the deposition of Mr. Weston, which was taken at Seattle."

Mr. MOORE.—"May it please your Honor, I believe this refers to the London shipment and some matter of compromise, a controversy based on some examination and inspection in London or Liverpool, and we renew our objection to this deposition."

The COURT.—"Compromise with another party, of course, would be no objection to the use of it as evidence. The jury will determine how much weight, if any, it will be entitled to. The question I had in mind all along has been whether or not there is anything known to the trade or to experts that would cause the quality of the pears to deteriorate between here and London."

Mr. MOORE.—"We can show and will show that."

(Deposition of Robert D. Frey.)

The COURT.—“Then you will have a chance on surrebuttal. You may proceed. Objection overruled.”

Mr. MOORE.—“Save an exception.” [93]

DEPOSITION OF R. G. WESTON, FOR PLAINTIFFS.

The plaintiffs then offered and read in evidence the deposition of R. G. WESTON, who testified on direct examination, as follows:

My name is Richard George Weston. My business address is Powell Brothers & Co., 15 Philpot Lane, E. C., London. I am engaged in the business of canned goods generally, and have been engaged in that business a little less than fifty years. Our firm was established about fifty-five years ago, and I have been with them about forty years. For just that period I have been dealing in canned goods, purchasing them, in the United States of America. The last few years I have made purchases of canned pears on the Pacific Coast of the United States from canners. To be precise, we are agents for different packing companies—that is, in the British Isles we represent American manufacturers and dealers in canned fruits. I am familiar with the different grades of canned fruits, and particularly canned pears, as they are sold on the Pacific Coast of the United States of America. Powell Brothers & Co. in the fall of 1924 made a purchase of 5,000 cases second standards— $2\frac{1}{2}$ second standards, pears, from

(Deposition of R. G. Weston.)

Dodwell & Company, who acted through Meinrath, Corbaley & Co. from the Everett Fruit Products Company. Under that contract deliveries of canned pears were made at London. I do not recall the approximate date of their receipt. I examined some of the contents of that shipment for quality. We opened a number of tins, sufficient to prove the quality. The size of the fruit varied enormously, the pears in one tin ranging from the size of a half dollar piece to the customary size of pear used, which would be expected to be tendered—that is customary. In several tins [94] we found one or more pears which were so soft that they were in a state of mush. Furthermore, in a large number of pears pieces had been cut out of them to remove a damaged portion, and even some pears had a hole drilled right through them to remove such damaged portion. The Liverpool shipment of 500 cases bore the can mark on the tins of "HGB" and on the London shipments of 1,000 cases and 296 cases, the can mark was "HGE." The total shipment was 1,796 cases. Fifteen hundred cases were shipped by the S.S. "Urania" from the Pacific Coast, of which 500 cases were landed in Liverpool and the remaining 1,000 cases were transshipped from—

"I will finish my answer please—"

of which 1,500 cases were shipped from the Pacific Coast by S.S. "Urania," of which 1,000 cases were landed in London and 500 cases were transshipped from London by the S.S. "Southern Coast," to Liverpool. The remaining 296 cases were shipped

(Deposition of R. G. Weston.)
from the Pacific Coast by S.S. "London Shipper."
The examination that I made of the samples drawn
at London was in my usual course of business there.

On cross-examination the witness R. G. WESTON
testified, as follows:

I made an examination of these samples in our
sample room in London, in our London office. Of
the Liverpool shipment I examined personally about
twelve tins. Of the London shipment I examined
about twelve tins of each, two shipments. The ex-
amination was made in the sample room, respectively
in our London office and in our Liverpool office, and
that was the first time that I had seen the samples,
when I [95] saw them in our sample room.

Thereupon the plaintiffs rested.

SURREBUTTAL.

TESTIMONY OF F. B. WRIGHT, FOR DE- FENDANT (RECALLED IN SURREBUT- TAL).

In surrebuttal the defendant then offered in evi-
dence the testimony of F. B. WRIGHT, who, on
direct examination, testified, as follows:

Mr. MOORE.—"Mr. Wright, as a man familiar
with canned fruits and canned pears, in the canning
and delivering of those pears, do you know what
would be the effect or probable effect of a long ship-
ment, say, by a steamship, from Everett to Liver-
pool, England, on the contents of the cans?"

(Testimony of F. B. Wright.)

A. "I could not tell the exact percentage; it varies; it is handled rougher in some ships than it is in others."

Q. "Then, the handling would tend to have some effect?" A. "Yes, it does."

Q. "What effect?"

A. "Deterioration in appearance."

Q. "Would it have any other effect, or will you describe just what the effect is?"

A. "A pear is a delicate piece of fruit, and the rougher a case or package is handled, the more opportunity there is for breaking down the pieces of pears. Pears are canned in halves in all grades except seconds. Anything goes in the seconds, but there will be more or less deterioration in shipping by water, or in shipping by mail or shipping by express."

I do not know where these cans of pears were stowed in the vessels on which they were sent to Powell & Company. It would make a big difference on the final condition [96] of the pears on arrival as to what temperature they had been kept at. If kept under a warm or hot temperature, pears would deteriorate a great deal quicker than they would under ordinary temperature. These steamer shipments of pears are generally stowed in the holds of the vessel. The samples that were sent to Zinn & Company were sent by parcel post.

Q. "Can you state what the probable effect on

(Testimony of F. B. Wright.)

pears is in shipment by parcel post from Seattle to San Francisco?"

A. "Sometimes it has a very disastrous effect, because they get rough treatment being handled by the Post Office department, and helps to break up the pieces worse than they were to start with."

On cross-examination the witness F. B. WRIGHT testified, as follows:

Shipment either by parcel post or by boat does not make worm-holes or holes clear through the pieces. That class of fruit is permissible in second pears. My interpretation of seconds is that everything that is not standard goes into seconds. That is why it is seconds, because it is not suitable to put in standard or choice or a better grade.

Q. "Look at this Defendant's Exhibit 'A-1' and at the designation of substandard and also the designation of pie.

A. "Substandards, no size limit. Now, it says the fruit to be tolerably free from blemish, and tolerably uniform in size."

Q. "Now, read what the qualification for pie is in there."

A. "Wholesome fruit unsuitable for other grades. * * * Everything that is not suitable for standards; that is, of any firmness, can go into seconds. We have always packed them as such."

Q. "So that all fruit that you packed at your plant during 1924 which was not suitable for standards, you put into the substandards?" [97]

(Testimony of F. B. Wright.)

A. "Not all fruit, no. There is a pie grade un-
(Testimony of F. B. Wright.)

der that. A soft, mushy pear goes to pie."

I do not know the quantity of seconds and pie packed by our company last year. I could not tell you without referring to the records the total pack of our company for standard pears in 1924. It was more than approximately 80,000 dozen. I could not say how much more than that without referring to the records. Our pack of water pears was a great deal more than 100 dozen. It was probably 2,000 cases. Our pack of seconds for the season was something in the neighborhood of forty or fifty per cent of our contracts for the sale of seconds. My recollection is that we had packed about forty or fifty per cent to deliver on orders of one hundred per cent.

On redirect examination the witness F. B. WRIGHT testified, as follows:

There was a short crop that year, and there was a short pack that year.

Mr. MOORE.—"We rest. At this time the defendant desires to move the Court for a directed verdict for the defendant in this case. I will state our grounds very briefly."

The COURT.—"Proceed."

Mr. MOORE.—"May it please the Court, there are three grounds upon which I would urge this motion. One of them is an alternative ground. First of all, the testimony adduced by the plain-

(Testimony of F. B. Wright.)

tiffs' own witnesses shows that the contract in question was assigned to the California Packers' Corporation, or the California Canners' Association, whatever the name of that company was, and that that company was and is the owner of the contract, and such being the case the plaintiff in this case is now the real party in interest and has no right to maintain this action.

"In the alternative, if your Honor should take the view that instead of being an absolute [98] assignment of the contract, that this was merely a resale or subsale by the plaintiff, then we have this situation: That if the plaintiffs should be entitled to recover at all, the measure of their damages would be the difference between the contract price and the subsale price, and would be limited to that, and yet there is no evidence here before your Honor to show that there was any advance or any difference whatsoever,—no evidence to show they suffered any damage whatsoever.

"Again, on the question of the contract itself, your Honor will notice that those two contracts provide for a sale of substandard pears, subject to approval of sample. There was no present consideration paid for that contract; that agreement was a unilateral agreement and amounted to nothing more than an option on the part of the buyer. The buyer had the privilege of rejecting the pears, samples of which were submitted to him, even though they would come within the substandard grade. They might not suit his particular taste or his par-

(Testimony of F. B. Wright.)

ticular trade. He could reject those and the Everett Fruit Products Company would have no right of action against him for rejecting. There was no obligation or promise or agreement on the part of Hoffman & Greenlee to accept the samples submitted to them, and there being no obligation of that sort, no consideration was paid for the contract. The contract was unilateral and nothing more than an option, and at any time prior to the exercise of that option could have been rescinded by either party. We respectfully submit to your Honor that upon those grounds or upon any one of those grounds that there should be a directed verdict for the defendant in this case."

(Argument by Mr. Moore.)

Mr. KERR.—"Since counsel for defendant has moved for a directed verdict, I at this time join in the motion for a directed verdict and ask your Honor to decide the case and not submit to the jury any question except the question of damage."

(Argument by Mr. Kerr.)

The COURT.—"The contract in this case is a contract for the purchase of a certain amount of canned pears of a well-known and standard grade in the trade, called substandards or seconds. Taking the contract as a whole, it is very apparent that both parties intended it in good faith and by them each to be performed in good faith. The defendant was to furnish pears of the grade for which he had contracted, and the plaintiff to [99] take those pears providing they were of that grade and

(Testimony of F. B. Wright.)

approved even as it might be to his sense of taste.

"In respect to the sample. The contract contained the term 'subject to approval of sample.' A party who contracts in that fashion leaves the question of approval entirely to the other party. He is not obliged to do it. The evidence in this case is that they did, however, for the defendant shipped those samples down to San Francisco to Zinn & Company, and by Zinn & Company they are submitted to the plaintiff. You leave the question of approval, then, of the material to be furnished in the contract entirely to the buyer, as was done in this case. Of course there was a reason why the plaintiff would want samples before it accepted the goods. The goods were to be packed in Washington, and the plaintiffs' home office, at least so far as it appears, its only place of business was in San Francisco, and it desired to inspect the fruit, at least that far, before it would consent to receive it, and hence this stipulation as to approval of the sample. The law in reference to 'that is this: It is a binding contract, and the parties leave it to the buyer to say whether he will approve the sample, but he is obliged to act in good faith and have motives of honesty and justice to the other party. He still has a right to say there is that in the fruit that does not meet his approval, and that rejects it, and he would still be entitled, as the Court views it in this case, to recover his damages. It is not a question of whether the pack would be sufficient to satisfy the contract, because the buyer

(Testimony of F. B. Wright.)

in this case stipulated that he should be satisfied with the sample. In other words, if the sample did not please him, and if he acted in good faith, not from any dishonest purpose, and found the goods did not come up to the standard, his judgment is final and conclusive, and could only be impeached if there was evidence in the case to warrant the jury to find that the buyer, namely the plaintiff in this case, was acting in bad faith and should have been satisfied where he said he was not satisfied.

“For these reasons the Court will grant the motion of the plaintiffs for a directed verdict, and will deny a like motion for the defendant. That is to say, the plaintiff is entitled to recover. How much he is entitled to recover will be left for the jury to determine.”

Mr. MOORE.—“Save an exception, your Honor.” [100]

The COURT.—“An exception will be noted. Proceed with the argument.”

(Argument to jury by respective counsel.)

INSTRUCTIONS REQUESTED BY DEFENDANT.

The defendant presented to the Court certain instructions in writing, as follows, and requested the Court to give each and all of said instructions, being instructions Nos. 1 to 9, inclusive.

(The following notation signed by the trial Judge appears endorsed on the face of said written, requested instructions, to wit:

"Laid on the bench, after the Court determined the parties motions each for a directed verdict.

BOURQUIN, J.")

The said requested instructions are, as follows:

**DEFENDANT'S REQUESTED INSTRUCTION
No. 1.**

You are instructed if you find from the evidence that the pears purchased from the defendant by the plaintiffs were purchased for the purpose of resale and that the defendant knew that said pears were purchased for the purpose of resale and that said pears were resold by said plaintiffs to the California Packing Company, then you are instructed that the measure of damages in this case is the difference between the contract price and the price of such resale, and there being no evidence in this case of the resale price, you shall find for the defendant. [101]

**DEFENDANT'S REQUESTED INSTRUCTION
No. 2.**

You are instructed that under the contract made between the plaintiffs and the defendant for the sale of pears the plaintiffs agreed to purchase from the defendant substandard pears of defendant's 1924 pack "subject to the approval of plaintiffs." and if you find from the evidence in this case that said defendant submitted to the plaintiffs fair samples of its 1924 pack of substandard pears as packed by said defendant and that said plaintiffs failed and refused to approve said samples, then

there was no sale and you shall find for the defendant.

In the event that the Court refuses to give the foregoing instruction the defendant requests the Court to give the defendant's requested Instruction No. 3.

**DEFENDANT'S REQUESTED INSTRUCTION
No. 3.**

You are instructed that under the contract between the said plaintiffs and defendant for the sale of pears as alleged in the complaint herein it is provided that such sale is "subject to approval of sample" and if you find from the evidence in this case that the defendant submitted to the plaintiffs sample cans of pears and that such samples submitted were of the grade known as "substandard pears" and that the plaintiffs failed and refused to approve such samples so submitted, then there was no sale and you shall find for the defendant.

**DEFENDANT'S REQUESTED INSTRUCTION
No. 4.**

You are instructed that under the contract between the plaintiffs and the defendant the plaintiffs purchased [102] from the defendant pears "subject to approval of sample" and it was the duty of defendant under such contract to submit to the plaintiffs samples of substandard pears of its 1924 pack and the obligation was upon the plaintiffs to approve or reject such samples, and if you find in this case from the evidence that such contracts as set forth in the complaint herein were assigned to

the California Packing Company or that the pears covered by said contract were resold to the California Packing Company and that the plaintiffs delegated to a representative of the California Packing Company the duty to inspect said pears and to reject or approve such pears, then you shall find for the defendant for the reason that said plaintiffs under said contract had no right to delegate the authority to any other person or persons.

DEFENDANT'S REQUESTED INSTRUCTION**No. 5.**

You are instructed that if you find from the evidence that the defendant submitted to the plaintiffs samples of canned pears which samples could be properly graded according to the grades known and established among the trade in the Pacific northwest as substandard pears, and that said plaintiffs rejected or refused to approve such samples, then you shall find for the defendant and it makes no difference for the purposes of this instruction whether such substandard pears were good, bad or indifferent so long as they were substandard pears.

DEFENDANT'S REQUESTED INSTRUCTION**No. 6.**

You are instructed, if you find from the evidence that the plaintiff had made a subsale to the California [103] Packers' Corporation, or any other person, of the pears described in the contracts in this case between the plaintiff and the defendant, and if you further find that the defendant failed to furnish to the plaintiff samples of substandard

pears described in said contracts, and if you further find that the plaintiff is entitled to recover damages from the defendant for such failure, then in ascertaining such damages, you are hereby instructed that if you find that such subsale was made, as hereinabove mentioned, then the plaintiff would not be entitled to recover any more than nominal damages.

**DEFENDANT'S REQUESTED INSTRUCTION
No. 7.**

You are instructed that if you find from the evidence that the contracts between the plaintiff and the defendant have been assigned to the California Packers Corporation or to any person other than the plaintiff, then you shall find for the defendant.

**DEFENDANT'S REQUESTED INSTRUCTION
No. 8.**

You are requested to find for the defendant.

COURT'S INSTRUCTIONS.

Thereupon the Court gave the following instructions to the jury:

Gentlemen of the Jury: It is now for the Court to give you the instructions that are applicable in the case. The facts you will find, as always, for yourselves.

In this case there is only the question of [104] the amount of the damages which is left to you. The question of who is entitled to recover on the findings and the evidence in this case was a question, as it turns out, for the Court to decide, and

the Court decided on these contracts and in view of all the evidence, the plaintiffs are entitled to recover. It is left to you to say how much. At the very least plaintiffs would be entitled to nominal damages, which is one dollar. If, in your honest judgment, the plaintiffs have suffered substantial damages, it will be your duty to allow them whatever amount your judgment is.

The contracts called for five thousand cases of two dozen cans each, of the variety of pears known as substandards. Samples were to be delivered, were delivered and they were rejected and disapproved by the plaintiffs in the case. The samples which were expressly sent by the defendant to the plaintiffs in San Francisco, apparently were received and examined along about September 12, 1924, and disapproved, and at that time the plaintiffs had the defendant's Agent, Mr. Zinn, send a telegram stating that the samples were not satisfactory.

According to the contracts, as I understand them, no definite date of delivery is fixed in them. Consequently, the date of delivery would be any time that in your judgment would be a reasonable time after September 12, 1924, and, consequently, the damages to which plaintiffs would be entitled would be such as might be the difference in the price that it was to pay to the defendant and the market value of the goods in the same market during that interval of time. That is the rule of damages, the difference between what the buyer was to pay for the goods and what he could restore himself by going

[105] into the open market and buying the goods, what price he would have to pay. If the plaintiffs were to pay \$2.50 a dozen for these goods, and if they could in the open market buy the same goods for \$2.50, of course they would not be damaged anything beyond mere nominal damages, which is one dollar, by reason of the breach of the contracts.

On the other hand, if it was necessary for the plaintiffs to pay in the open market \$2.65, \$2.85, or \$2.90 a dozen, the plaintiffs would be damaged the difference between \$2.50 and the \$2.85 or \$2.90 they would have to pay on the open market.

Now, what was the market value, of course, is an issue for you to decide. For when you once determine what the market value is, you simply deduct from that the price that the plaintiffs were to pay, which will give you the amount of damage on each dozen. Mr. Hoffman, a member of the partnership, testified that at that time, September 12th to October 18, 1924, the price of like goods on the Pacific Coast—these goods are shipped by freight, and perhaps the price in one place would not be very much different from another—was \$2.85 or \$2.90 a dozen, which would be thirty-five or forty cents above the price that Hoffman & Greenlee were to pay to the defendant for the goods. Pratt, who was with the California Packing Company, if I remember rightly,—what their relations were with the plaintiffs, if any,—I do not know that they had any,—you will take the testimony, Gentlemen of the Jury,—but Mr. Pratt testified these goods, substandards, at the time, about Sep-

tember 12, 1924, when these samples were examined by Hoffman & Greenlee and rejected, were \$2.90 a case. Now, that is all the testimony in chief on the part of the [106] plaintiffs in reference to market value.

The defendant presented in its behalf, the testimony of Mr. Ribbeck, a member of the company, who testified that in September, 1924, the price was about \$2.50 a dozen. How much more he does not say. From the standpoint that he is an interested party, you can draw the conclusion—though you are not bound to—that he did not mean anything less than \$2.50. In other words, in the case of all interested witnesses you may consider whether they are not apt to draw the testimony just as favorably to themselves as they can, and, of course, as they deem it consistent with their oath. That would apply also to Mr. Hoffman and his testimony of \$2.85 of \$2.90 a dozen. Mr. Wright, also associated with the defendant, testified that the price during that time, September and October, and even to the first of 1925, was \$2.50, and the highest was \$2.65 a dozen cans. That at the very least is \$2.65, which would be fifteen cents more than the plaintiffs were required to pay the defendant for the goods.

In rebuttal the plaintiffs made use of the testimony of Mr. Longwell, who was one of their agents, if I remember rightly, and he testified that at that time, October 1st, the goods were worth \$2.85 at the factory, a dozen, and \$2.90 alongside steamer. The goods in this case were contracted to be delivered free alongside steamer, \$2.90 along steamer.

Now, this evidence in rebuttal, the distinction between its value and that in chief is very hard for the average man to appreciate. But the evidence of Mr. Longwell simply goes, not to sustain the fact that the goods were actually worth so much money, but simply as an offset, so far as you may think it does impeach—as we use that term—the evidence on behalf [107] of the defendant that the goods were only worth \$2.65 or \$2.50.

Gentlemen of the Jury, that is the whole case. There is no law to be dwelt upon by the Court. All you are required to do is to determine the market price of those goods at and after the time when the defendant should have delivered them to the plaintiffs. When you have found that market price, if it is more than \$2.50, subtract \$2.50 from it, and then it is so many cents a dozen, and the plaintiffs are entitled to that amount on ten thousand dozen case of pears. You will write that amount in your verdict.

Twelve of your number must agree upon a verdict in this case.

I may say to you, of course, this is different than a criminal action. In a criminal case the proof in behalf of the plaintiff must be beyond reasonable doubt. In this case the plaintiffs must prove their case, the amount of their damages, by simply the greater weight of the evidence, that evidence which outweighs the evidence of the other party. The credibility of the witnesses is for you, how much weight you will give to their testimony. That is, on

the credibility of the witnesses you are to ascertain the market value of those goods at the vital time.

Mr. MOORE.—We have certain exceptions, if your Honor please, that we would like to take to your Honor's instructions.

The COURT.—Proceed.

Mr. MOORE.—The defendant excepts to the refusal of the Court to give its requested Instruction No. 1.

The defendant excepts to the refusal of the Court to give its requested Instruction No. 2. [108]

The defendant excepts to the refusal of the Court to give its requested Instruction No. 3.

The defendant excepts to the refusal of the Court to give its requested Instruction No. 4.

The defendant excepts to the refusal of the Court to give its requested Instruction No. 5.

The defendant excepts to the refusal of the Court to give its requested instruction—I will ask the Clerk to mark it No. 6, being the next one following after No. 5. I will read the requested instruction, your Honor, in order to get it into the record.

The defendant excepts to the refusal of the Court to give its following requested instruction: (Reads).

The defendant excepts to the refusal of the Court to give the following requested instruction:

“You are instructed if you find from the evidence that the contracts between plaintiff and defendant—”

The COURT.—Just a minute. Haven't you got these numbered? We do not want you to read all these instructions to the jury, as we do not have the

time for it, and when the jury get out they will forget which instructions you read and what the Court gave.

Mr. MOORE.—If the Clerk will mark it No. 7, then we will except to the refusal of the Court to give defendant's requested Instruction No. 7.

The COURT.—Yes. I know that happens, that when the jury retires they do not know what the lawyers have said and what the Court has said.

Mr. MOORE.—We ask the Court to identify the next instruction as Instruction No. 8. [109]

The COURT.—Give it any number; any arbitrary number will do. You do not have to have them in order.

Mr. MOORE.—We except to the Court's refusal to give each and every instruction requested by the defendant, and which was refused by the Court, including Nos. 6, 7 and 8, as well as the other numbers mentioned.

The COURT.—Very well.

Mr. MOORE.—The defendant also excepts to the instruction of the Court to the effect that the only question is a question of damage.

It excepts to the instructions of the Court wherein the Court stated there was no date fixed for the delivery of the goods.

The defendant excepts to the instruction of the Court where the Court instructed in substance and effect that the measure of damages was the difference between the contract price and the market price.

The defendant further excepts to the instruction of the Court to the effect that the time for determining the market price could be taken at any time within the limits stated by the Court, subsequent to September 12, 1924.

The defendant excepts to the instruction of the Court to the effect that there is no difference, or no substantial difference in the market price of the goods at different points or localities.

The defendant excepts to the instruction of the Court in commenting on the testimony of Mr. Ribbeck to the effect that his testimony that the market price was about \$2.50 meant that it was \$2.50 or more than [110] that.

The defendant also excepts to the instruction of the Court relative to Mr. Ribbeck being an interested witness. Those are the exceptions.

The COURT.—Let the record show the instructions which the Court, as counsel states, did not give, and to which he excepts, were presented to the Court, laid upon the bench, after the Court had ruled upon the motions in respect to the verdict.

The Court will give you the pleadings, Gentlemen of the Jury, to refresh your recollection, and the contracts in reference to the number of cases, and a single form of verdict, in which you will fill in the amount.

Mr. MOORE.—May it please your Honor, may I have the record show that the requested instructions were first laid on the desk of the Clerk before they were put on your Honor's desk.

The COURT.—You may, if that is the fact, and if counsel agrees to it.

Mr. MOORE.—I will ask counsel—

Mr. KERR.—I do not know, but I do know that Mr. Moore did request a directed verdict, which I assume waives those matters.

The COURT.—Well, let the record stand as it is.
(Thereupon jury retired to consider its verdict.)"

[111]

And, now, in furtherance of justice and that right may be done, the defendant tenders and presents the foregoing as its bill of exceptions in the above-entitled cause, and prays that the same may be settled and allowed and signed and certified by the Judge who tried said cause, as provided by law.

WILLIAM & DAVIS,
REAMES & MOORE,
Attorneys for Defendant.

Copy of the attached bill of exceptions received and due service thereof admitted this 22d day of March, 1926.

KEER, McCORD & IVEY,
N. S.
Attorneys for Plaintiffs. [112]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

On this — day of —, 1926, the above-entitled matter came on to be heard on application of the defendant, Everett Fruit Products Co., to settle

the bill of exceptions in said cause; the defendant appearing by its attorneys, Williams & Davis and Reames & Moore, and the plaintiffs appearing by their attorneys, Kerr, McCord & Ivey; and it appearing to the Court that the bill of exceptions was duly served on the attorneys for the plaintiffs and lodged with the Clerk of this Court, and presented to the Court within the time provided by law as duly extended by the order of the Court herein, and that amendments thereto have been accepted and incorporated therein, and all the parties consenting to the signing and settling of the same; and it appearing that the time for settling said bill of exceptions has not expired; and it further appearing to the Court that the defendant's bill of exceptions contains all the evidence introduced or offered in the trial of said cause and all the material matters and things [113] occurring upon said trial relating to the foregoing exceptions;

NOW, THEREFORE, I, GEORGE M. BOURQUIN, United States District Judge, who presided at the trial of the above-entitled cause, do hereby certify that the defendant's bill of exceptions is a full, true and correct bill of exceptions in the above-entitled cause; that the foregoing recitals with reference thereto are true and correct, and the same is now by me hereby settled and allowed and approved as a true and correct bill of exceptions in said cause.

Done in open court this 30 day of March, 1926.

BOURQUIN,
Judge.

[Endorsed]: Lodged Mar. 22, 1926.

[Endorsed]: Filed Mar. 30, 1926. [114]

[Title of Court and Cause.]

TIME EXTENDED FOR SUING OUT WRIT
OF ERROR.

Now on this 4th day of May, 1926, an order is entered extending term for suing out of writ of error and all other proceedings relating to said cause.

Journal No. 14 at page 397.

[Title of Court and Cause.]

ENTERED ORDER (EXTENDING TERM).

Now on this 2d day of November, 1926, an order is entered on motion of Ben L. Moore, extending term for disposition of motion for a new trial and for suing out writ of error.

Journal No. 14 at page 674. [115]

[Title of Court and Cause.]

**ORDER ENLARGING TIME TO FEBRUARY
5, 1927, FOR FILING RECORD.**

Upon application of the plaintiff in error, and for good cause shown,

IT IS HEREBY ORDERED: That the time within which the citation in error herein shall be made returnable and the time within which the plaintiff in error shall file the record and docket the case with the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and hereby is enlarged, and is fixed as the 5th day of February, 1927.

Done in open court this 10th day of November, 1926.

JEREMIAH NETERER,

Judge United States District Court for the Western District of Washington, Northern Division.

[Endorsed]: Filed Nov. 10, 1926. [116]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of record in the above-entitled cause for presentation to the Circuit Court of Appeals for the Ninth Circuit upon the writ of error of the defendant, Everett

Fruit Products Company, a corporation, and in the preparation of said transcript, you will please prepare and certify a copy of the following papers filed and proceedings had, to wit:

1. The complaint.
2. The process and return.
3. The answer of defendant and reply of plaintiffs.
4. Impaneling jury.
5. Verdict.
6. The judgment.
7. Order extending time for presenting and settling bill of exceptions.
8. Bill of exceptions.
9. Motion for a new trial. [117]
10. Order or record memorandum thereof made on May 4, 1926, extending the term.
11. Order for record memorandum thereof made on November 2, 1926, extending the term.
12. Order overruling the motion for a new trial, and record of entry thereof.
13. Petition for writ of error.
14. Assignment of errors.
15. Order allowing writ of error.
16. Writ of error.
17. Citation in error.
18. Bond and approval.
19. Clerk's certificate.
20. This praecipe.
21. Order enlarging time for filing record.

Dated at Seattle, Washington, this 10th day of November, 1926.

WILLIAMS & DAVIS,
REAMES & MOORE,

Attorneys for Defendant, Everett Fruit Products Company, a Corporation.

Service of the within and foregoing praecipe for transcript and receipt of a true and correct copy thereof is hereby admitted this 10 day of November, 1926.

KERR, McCORD & IVEY,
Attorneys for Plaintiffs, Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, Copartners Doing Business Under the Firm Name and Style of "Hoffman & Greenlee."

[Endorsed]: Filed Nov. 10, 1926. [118]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 118, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel

filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [119]

Clerk's fees (Act of February 11, 1925) for making record, certificate or return	329
folios at 15¢.....	\$49.35
Certificate of Clerk to transcript of record, with seal .....	.50
<hr/>	
Total.....	\$49.85

I hereby certify that the above cost for preparing and certifying record, amounting to \$49.85 has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and citation on writ of error issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 24th day of November, 1926.

[Seal] ED. M. LAKIN,
Clerk, United States District Court, Western Dis-
trict of Washington.

By S. E. Leitch,
Deputy. [120]

[Title of Court and Cause.]

WRIT OF ERROR.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America,
to the Honorable Judge of the United States
District Court for the Western District of
Washington, Northern Division, GREETING:

Because in the record and proceedings, as also
in the rendition of the judgment of a plea which is
in the said District Court before you, in that cause
wherein Oscar Hoffman, Elwood C. Boobar and
Fred S. Greenlee, copartners doing business under
the firm name and style of "Hoffman & Greenlee,"
are plaintiffs and Everett Fruit Products Co., a
corporation, is defendant, a manifest error has
happened to the damage of the said Everett Fruit
Products Co., a corporation, plaintiff in error, as
by said complaint appears, and we, being willing
that error, if any hath been, should be corrected
and full and speedy justice be done to the party
aforesaid in this behalf, do command you if judg-
ment be therein given that under your seal distinctly

and openly you [121] send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the courtroom of said court, in the Postoffice Building at San Francisco, California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this, the 10th day of November, A. D. 1926.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court for the
Western District of Washington.

By S. E. Leitch,
Deputy.

Allowed this 10 day of November, A. D. 1926.

JEREMIAH NETERER,
United States Judge. [122]

Copy received and service acknowledged Nov. 10,
1926.

KERR, McCORD & IVEY,
Attys. for Defendants in Error.

Filed Nov. 10, 1926. [123]

[Title of Court and Cause.]

CITATION IN ERROR.

The United States of America,
Ninth Judicial Circuit,—ss.

To Oscar Hoffman, Elwood C. Boobar and Fred S.
Greenlee, Copartners Doing Business Under the
Firm Name and Style of "Hoffman & Green-
lee," GREETING:

YOU ARE HEREBY CITED and admonished
to be and appear in the United States Circuit Court
of Appeals for the Ninth Circuit to be held in the
City of San Francisco, State of California, on the
5 day of February, 1927, next, pursuant to a writ
of error filed in the clerk's office of the District
Court of the United States for the Western District
of Washington, Northern Division, wherein Everett
Fruit Products Co., a corporation, is plaintiff in
error and you are defendant in error, to show cause,
if any there be, why the judgment rendered against
the said plaintiff in error as in the said writ of
error mentioned, [124] should not be corrected,
and why speedy justice should not be done to the
parties in that behalf.

WITNESS the Honorable JEREMIAH NET-
ERER, United States District Judge for the West-

ern District of Washington, this, the 10 day of November, 1926.

JEREMIAH NETERER,
Judge of the United States District Court for the
Western District of Washington.

[Seal] Attest: ED. M. LAKIN,
Clerk of the United States District Court for the
Western District of Washington.

By S. E. Leitch,
Deputy. [125]

Service of the within and foregoing citation in error and receipt of a true and correct copy thereof is hereby admitted this 10 day of November, 1926.

KERR, McCORD & IVEY,
Attorneys for Defendants in Error.

Filed Nov. 10, 1926. [126]

[Endorsed]: No. 5020. United States Circuit Court of Appeals for the Ninth Circuit. Everett Fruit Products Co., a Corporation, Plaintiff in Error, vs. Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, Copartners Doing Business Under the Firm Name and Style of Hoffman & Greenlee, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed December 6, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

EVERETT FRUIT PRODUCTS CO.,
a corporation,

Plaintiff in Error,
vs.

OSCAR HOFFMAN, ELWOOD C.
BOOBAR and FRED S. GREEN-
LEE, copartners, doing business
under the firm name and style
of HOFFMAN & GREENLEE,

Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE GEORGE M. BOURQUIN, Judge.

Brief of Plaintiff in Error

WILLIAMS & DAVIS,

Commerce Bldg., Everett, Washington

REAMES & MOORE,

Dexter Horton Bldg., Seattle, Washington

Attorneys for Plaintiff in Error.

United States Circuit Court of Appeals for the Ninth Circuit

EVERETT FRUIT PRODUCTS CO.,
a corporation, }
Plaintiff in Error,
vs.
OSCAR HOFFMAN, ELWOOD C.
BOOBAR and FRED S. GREEN-
LEE, copartners, doing business
under the firm name and style
of HOFFMAN & GREENLEE,
Defendants in Error. }

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE GEORGE M. BOURQUIN, *Judge.*

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

This was an action brought by the Defendants in Error, wherein they claimed that by two certain written contracts, executed in August, 1924, they agreed to buy and Plaintiff in Error agreed to sell "subject to approval of sample," a quantity of canned sub-standard pears "to be of the 1924 pack

of pears as packed by the defendant" (Plaintiff in Error), at an agreed price; that the Plaintiff in Error failed to submit or tender samples, and that the Defendants in Error were thereby damaged in an amount equal to the difference between the contract price and the market price, and that said difference was the sum of Four Thousand Dollars (\$4000.00) (Tr. p. 2, 3, 4).

The Plaintiff in Error claimed that the said two written agreements for the sale of pears "subject to approval of sample" were, by virtue of said quoted provision, lacking in mutuality (Tr. p. 118); that, aside from said question, there was no breach (Tr. p. 10), and no damage (Tr. p. 11); that Plaintiff in Error in 1924 packed or canned pears of the grade called "Sub-Standard," being of the grade covered by said agreements, and sent samples thereof to Defendants in Error for inspection; that Defendants in Error inspected the pack of sub-standard pears at the plant or factory of Plaintiff in Error at Everett, and also inspected the samples sent to them, but rejected and refused both, and failed and refused to order the delivery of such pears (Tr. p. 11, 12).

The cause came duly on for trial before a jury which was impanelled and sworn (Tr. p. 14). From the evidence it appeared that Plaintiff in Error, in 1924 and prior and subsequent thereto, was engaged in the business of canning fruits and vegetables (Tr. p. 77). On its behalf evidence was adduced to the

effect that in 1924 it packed a grade of pears conforming to the specifications of the Northwest Canners' Association for sub-standard pears, and that its pack of that grade was uniform throughout the season (Tr. pp. 77, 78, 84, 93).

This pack was examined some time in August, at the plant of the plaintiff in Error, in Everett by Mr. Longwell (Tr. pp. 84, 91, 93, 97). Mr. Longwell was making the inspection at that time as the agent of the California Packing Corporation, the owner of the "contracts" sued upon, (Tr. p 90), which had been assigned to it by Hoffman & Greenlee (Tr. p. 89). Testimony on both sides indicated that Mr. Longwell refused to approve these pears inspected in August (Tr. pp. 84, 92).

Again in October, 1924, Mr. Longwell called at the Everett plant, but refused to make further inspection (Tr. pp. 86, 87, 91, 92, 100), although the Plaintiff in Error offered such inspection to him (Tr. p. 86).

In the meantime, in September, 1924, Plaintiff in Error, sent samples of its sub-standard pears for inspection to Zinn & Co., the broker who had acted between the parties. These samples were received and inspected by the Defendants in Error (Tr. pp. 53, 64), and were by them rejected (Tr. pp. 54, 65).

There was some evidence adduced on behalf of Defendants in Error, in their case in chief, tending to show that the samples of pears inspected at the Everett plant in August, 1924, and the samples sub-

mitted in September, 1924, were not of the grade known as sub-standard (Tr. pp. 64, 68, 72, 74). On the other hand there was some evidence adduced on behalf of Plaintiff in Error, tending to show that the samples of pears inspected at the plant in August, and the samples inspected in September, and also the pears which Mr. Longwell refused to inspect in October, were of the grade designated as sub-standard (Tr. pp. 78, 84, 87, 92, 93, 94).

There was testimony on behalf of the Plaintiff in Error that the samples submitted for inspection were from its *regular sub-standard pack for that year*, and of the same quality and grade as the rest of its sub-standard pack (Tr. p. 84). This testimony was not contradicted.

Although there was evidence to the effect that Defendants in Error expressed their disapproval of the samples submitted, there was no evidence that they, at any time, ordered from the Plaintiff in Error, or demanded shipment by it, of any of its 1924 pack of pears.

The parties to the action offered conflicting testimony as to the market price of pears at the time of the alleged breach (Tr. pp. 66, 85).

Witnesses for the Defendants in Error testified that the "contracts" *had been assigned* to the California Packing Corporation, which was the owner thereof (Tr. pp. 89, 90, 67, 69). The price for which said "contracts" were sold was not stated in the testimony.

At the conclusion of the case in chief of the Defendants in Error a motion for non-suit was interposed by the Plaintiff in Error and was by the court denied, and exception noted (Tr. pp. 15, 76).

Thereupon Plaintiff in Error proceeded to introduce testimony in support of its defense (Tr. p. 15).

Over the objection of Plaintiff in Error, the court permitted the witness F. B. Wright to be cross-examined relative to a shipment of pears to London, and contracts for shipment to California Packers Corporation, not involved in this action (Tr. pp. 87, 88).

After Plaintiff in Error had rested, the Defendants in Error introduced evidence in rebuttal.

Over objection, the court permitted Defendants in Error to introduce in rebuttal testimony by W. B. Longwell of the market value of pears at the time of the alleged breach (Tr. p. 102); and to introduce in rebuttal testimony by Robert D. Frey of the quality or grade of the samples submitted and of the market price (Tr. pp. 107, 109, 110, 111); and to introduce in rebuttal testimony by R. G. Weston concerning a shipment to London, not involved in this action, and concerning the condition or quality of said shipment and a controversy arising therefrom (Tr. pp. 111, 112, 113); and to introduce in rebuttal testimony by John L. Jacobs concerning the grade or quality of the samples submitted and concerning market price (Tr. pp. 104, 105, 106, 107).

Upon conclusion of all the testimony the Plaintiff in Error moved for a directed verdict upon certain specified grounds (Tr. pp. 117, 118, 119) and presented certain requested instructions (Tr. pp. 121, 122, 132, 133), being requested instructions numbered 1 to 8 respectively (Tr. pp. 122, 123, 124, 125).

Counsel for Plaintiff in Error argued the motion for a directed verdict, whereupon counsel for Defendants in Error stated to the court: "Since counsel for defendant has moved for a directed verdict, I, at this time join in the motion for a directed verdict and ask your Honor to decide the case and not submit to the jury any question *except* the question of damage."

The court then denied the motion of the Plaintiff in Error, granted the motion of the Defendants in Error, held that the latter were entitled to recover and submitted the sole question of damages to the jury (Tr. p. 121) upon the instructions given by the court (Tr. p. 125 to 130).

Thereafter verdict was returned for Defendants in Error, judgment was entered, motion for new trial was interposed by the Plaintiff in Error, and the said motion denied by the court.

ASSIGNMENTS OF ERROR.

II.

The court erred in the admission of the following evidence offered by the plaintiff on cross-examination of the witness, F. B. Wright, a witness for the defendant, which said evidence on cross-examination was objected to by the defendant on the ground that it was irrelevant, immaterial and not proper cross-examination. On cross-examination the said witness testified in substance over the objection of the defendant that the defendant corporation shipped a lot of fruit to London in 1924 and that the defendant had a contract in the fall of 1924 for delivery of sub-standard pears of the 1924 pack to California Canners Corporation of California.

IV.

The court erred in the admission of the testimony of W. B. Longwell, a witness on behalf of the plaintiffs, which was offered and admitted in rebuttal after the plaintiffs had rested their case in chief and after the defendant had rested its case in chief, which said testimony was not proper rebuttal testimony and was in effect as follows:

"I am familiar with the market price of this grade of pears in the State of Washington and along the Pacific Coast between the 1st of September and the 8th of October, 1924. The going market price for No. 2 $\frac{1}{2}$ sub-standard pears sold at Everett, Washington, for fall delivery in the 1924 pack on or about October

1, 1924, was \$2.85 factory or about \$2.90 steamer. After October the price remained about at \$2.85 to \$2.90 level. It was about in September, in the packing season of 1924 that the price reached \$2.85 or \$2.90, that is, the early part of September somewhere around the first to the 5th of September."

V.

The court erred in the admission of the testimony of Robert D. Frey, a witness on behalf of the plaintiffs, which was offered and admitted in rebuttal after the plaintiffs had rested their case in chief and after the defendant had rested its case in chief, which said testimony was not proper rebuttal testimony and was in effect as follows:

"I have been engaged for the last eleven years in buying and selling pears and keeping posted on the market and am qualified in determining grades. At the request of the officers of California Canners I made an examination of four samples of No. 2½ cans substandard pears offered by W. C. Zinn to the California Canners. One case cut was evidently not packed as substandard at all but contained a syrup two grades higher and evidently a mistake. The balance were not suitable for the grade, with the exception of one can which was, I should say, just about passable. Taken as a whole the samples examined were not substandard pears as said term is understood in the trade on the Pacific Coast. My recollection is that the market price for substandard pears on or about September 12, 1924, was in the neighborhood of \$2.80 to \$2.85 F. A. S. steamer Everett, Washington. Between September 12, 1924, and October 18, 1924, the market had advanced prob-

ably five to ten cents a dozen. The highest and lowest market value of the said pears between the said dates was \$2.80 and \$2.95."

VI.

The court erred in the admission of the testimony of R. G. Weston given by deposition and offered on behalf of plaintiff, upon the ground that said testimony referred to a London shipment and to a matter of compromise and a controversy based on examination and inspection in London or Liverpool which said testimony was to the following effect:

"I am associated with Powell Bros. & Company of London in the business of canned goods. In the fall of 1924, Powell Bros. & Company purchased 5000 cases second standards— $2\frac{1}{2}$ second standards, pears, from Dodwell & Company, who acted through Meinrath, Corbaley & Co. from Everett Fruit Products Co. Under that contract deliveries of canned pears were made at London. I examined some of the contents of that shipment for quality. The size of the fruit varied enormously. In several tins we found one or more pears which were so soft that they were in a state of mush. Furthermore, a large number of pears had pieces cut out of them to remove a damaged portion and even some pears had a hole drilled right through them to remove such damaged portion. 15,000 cases were shipped (30) from the Pacific Coast by the steamship 'Urania,' of which 1,000 cases were landed in London and 500 cases were transshipped from London to Liverpool. The remaining 296 cases were shipped from the Pacific Coast by the Steamship 'London Shipper.'

The examination of the samples drawn at London, that I made, was in my usual course of business there."

VII.

The court erred in the admission of the testimony of John L. Jacobs, a witness on behalf of the plaintiff, which was offered and admitted in rebuttal after the plaintiffs had rested their case in chief and after the defendant had rested its case in chief, which said testimony was no proper rebuttal testimony, and was in effect, as follows:

After giving testimony tending to show the qualifications and knowledge, the witness testified in substance: "I was present at the examination of samples, represented to be 'sub-standard' pears, packed by the Everett Fruit Products Company, submitted by Walter C. Zinn to our company. This examination was held in the office of M. Feibush, in San Francisco, in the presence of Robert Frey of the California Canneries Company, Mr. Feibush and myself. These samples were examined on two dates, on September 15th and September 25, 1924. The samples submitted, in our opinion, were not up to the grade of 'Sub-standard' pears. Most of the samples submitted contained a very large percentage of mushy, soft, broken fruit, which is absolutely unfit to be put into grade of 'Substandard' and belongs in the 'Pie' grade. Also a considerable number of halves in the samples submitted showed holes right through the center of the pears, making those particular halves unfit for the grade of 'Water' pears. The effect of the presence of such fruit in the samples submitted would render the sample unfit for the grade of 'Sub-standard' pears and unacceptable as such.

It is my recollection that the market value of 'Substandard' pears about the middle of September, 1924, had advanced very considerably from the market of the prior months of that year, and was somewhere in the neighborhood of \$2.85 per dozen, F. A. S. steamer, at the Northwest, including Everett, Washington. The market value was thoroughly sustained between the dates of September 12, 1924, and October 18, 1924, and, if anything, was rising slightly. It is my recollection that the market value of No. 2 $\frac{1}{2}$ 'substandard' pears, in the Northwest, including Everett, Washington, F. A. S. steamer, between September 12, 1924, and October 18, 1924, was between \$2.85 and \$2.90 per dozen."

VIII.

The court erred in denying the motion of the defendant, which was interposed at the conclusion of the plaintiffs' testimony in support of their case in chief, by which said motion the defendant challenged the sufficiency of the evidence produced on behalf of plaintiffs to sustain any verdict or judgment and moved the court for its order granting a non-suit of the plaintiffs' case, for the reasons:

- a. That plaintiffs' testimony failed to show that plaintiffs were the real parties in interest.
- b. That the agreements involved in the case were executory agreements without present consideration, of an optional character, and lacking in mutuality, and of no legal force and effect.
- c. That the plaintiffs' testimony failed to show that any pears were ever ordered by the plaintiffs pursuant to the contract.

d. That plaintiffs' testimony tended to show a resale of the pears to another corporation, and did not show any loss or damage to the plaintiffs.

IX.

The court erred in denying the motion of the defendant for a directed verdict for the defendant, which said motion was interposed at the conclusion of all of the testimony, in the case, and was upon the following grounds, to-wit:

a. That it appeared from the plaintiffs' testimony that the contract sued upon had been assigned to the California Canneries Association, which was and is the owner of the contract, and that the plaintiff in this cause is not the real party in interest herein.

b. That if of the plaintiffs are entitled to recover, the measure of their damages would be the difference between the contract price and the subsale price and would be limited to that, and that there is no evidence of any damage whatsoever suffered by plaintiffs.

c. That the contract sued upon was not supported by any present consideration that it was an unilateral agreement and of no legal binding effect.

X.

The court erred in granting the motion of the plaintiffs for a directed verdict and withdrawing from the consideration of the jury all questions save that of the amount of damages, for the following reasons:

- a. The motion of the plaintiffs was a qualified and conditional motion, which asked for the determination of the jury on the question of damages.
- b. That the defendant had submitted and requested the court to give special instructions on its behalf.
- c. There was a disputed issue of fact as to whether the samples furnished conformed to the specifications of the agreements and as to whether the defendant had breached any covenant of the agreement.

XI.

The court erred in granting the motion of the plaintiff for a directed verdict and in ruling and deciding that plaintiffs were entitled to recover, and directing the jury to return a verdict for the plaintiffs, for the reasons:

- a. That the plaintiffs were not the real parties in interest inasmuch as their testimony affirmatively showed that the agreements of purchase of pears had been assigned.
- b. The agreements involved in the case were executory agreements without present consideration, of an optional character, and lacking in mutuality and of no legal binding force or effect.
- c. The evidence showed that the plaintiffs had never approved any samples and had never ordered any pears, and that there was no breach of the agreements by the defendant.

d. The evidence showed that the defendant had performed whatever covenants of the agreements, if any, it was obliged to perform.

e. The court reached its decision without considering or determining the fact whether the samples of pears conformed to the specifications of the agreements.

f. That the testimony failed to show any damage suffered by the plaintiffs, and, therefore, failed to show any right of recovery by the plaintiffs.

XII.

That the court erred in refusing to give to the jury the defendant's requested instruction No. 1, as follows:

"You are instructed if you find from the evidence that the pears purchased from the defendant by the plaintiffs were purchased for the purpose of resale and that the defendant knew that said pears were purchased for the purpose of resale and that said pears were resold by said plaintiffs to the California Packing Company, then you are instructed that the measure of damages in this case is the difference between the contract price and the price of such resale, and there being no evidence in this case of the resale price, you shall find for the defendant."

XIII.

That the court erred in refusing to give to the jury the defendant's requested instruction No. 2, as follows:

“You are instructed that under the contract made between the plaintiffs and the defendant for the sale of pears the plaintiffs agreed to purchase from the defendant substandard pears of defendant’s 1924 pack ‘subject to the approval of plaintiffs,’ and if you find from the evidence in this case that the said defendant submitted to the plaintiffs fair samples of its 1924 pack of substandard pears as packed by said defendant and that said plaintiffs failed and refused to approve said samples, then there was no sale and you shall find for the defendant.”

XIV.

The court erred in refusing to give to the jury the defendant’s requested instruction No. 3, as follows:

“You are instructed that under the contract between the said plaintiffs and defendant for the sale of pears as alleged in the complaint herein it is provided that such sale is ‘subject to approval of samples’ and if you find from the evidence in this case that the defendant submitted to the plaintiffs sample cans of pears and that such samples submitted were of the grade known as ‘sub-standard pears’ and that the plaintiffs failed and refused to approve such samples so submitted, then there was no sale and you shall find for the defendant.”

XV.

The court erred in refusing to give to the jury the defendant’s requested instruction No. 4, as follows:

“You are instructed that under the contract between the plaintiffs and the defendant

the plaintiffs purchased from the defendant pears 'subject to approval of sample' and it was the duty of defendant under such contract to submit to the plaintiffs samples of sub-standard pears of its 1924 pack and the obligation was upon the plaintiffs to approve or reject such samples, and if you find in this case from the evidence that such contract as set forth in the complaint herein were assigned to the California Packing Company or that the pears covered by said contract were resold to the California Packing Company and that the plaintiffs delegated to a representative of the California Packing Company the duty to inspect said pears and to reject or approve such pears, then you shall find for the defendant for the reason that said plaintiffs under said contract had no right to delegate the authority to any other person or persons."

XVI.

The court erred in refusing to give to the jury the defendant's requested instruction No. 5, as follows:

"You are instructed that if you find from the evidence that the defendant submitted to the plaintiffs samples of canned pears which samples could be properly graded according to the grades known and established among the trade in the Pacific Northwest as sub-standard pears, and that said plaintiffs rejected or refused to approve such samples, then you shall find for the defendant and it makes no difference for the purposes of this instruction whether such sub-standard pears were good, bad or indifferent so long as they were sub-standard pears."

XVII.

The court erred in refusing to give to the jury the defendant's requested instruction No. 6, as follows:

“You are instructed, if you find from the evidence that the plaintiff had made a subsale to the California Packers' Corporation, or any other person, of the pears described in the contracts in this case between the plaintiff and the defendant, and if you further find the plaintiff is entitled to recover damages from the defendant for such failure, then in ascertaining such damages, you are hereby instructed that if you find that such subsale was made, as hereinabove mentioned, then the plaintiff would not be entitled to recover any more than nominal damages.”

XVIII.

The court erred in refusing to give to the jury the defendant's requested instruction No. 7, as follows:

“You are instructed that if you find from the evidence that the contracts between the plaintiff and the defendant have been assigned to the California Packers' Corporation or to any person other than the plaintiff, then you shall find for the defendant.”

XIX.

The court erred in refusing to give to the jury the defendant's requested instruction No. 8, as follows:

“You are requested to find for the defendant.”

XX.

The court erred in giving to the jury the following instruction:

“In this case there is only the question of the amount of the damages which is left to you. The question of who is entitled to recover on the findings and the evidence in this case was a question, as it turns out, for the court to decide, and the court decided on these contracts and in view of all the evidence, the plaintiffs are entitled to recover. It is left to you to say how much. At the very least plaintiffs would be entitled to nominal damages, which is one dollar. If, in your honest judgment, the plaintiffs have suffered substantial damages, it will be your duty to allow them whatever amount your judgment is.”

XXI.

The court erred in giving the following instruction to the jury:

“According to the contracts, as I understand them, no definite date of delivery is fixed in them. Consequently, the date of delivery would be any time that in your judgment would be a reasonable time after September 12, 1924, and, consequently, the damages to which plaintiffs would be entitled would be such as might be the difference in the price that it was to pay to the defendant and the market value of the goods in the same market during the interval of time. That is the rule of damages, the difference between what the buyer was to pay for the goods and what he could restore himself by going into the open market and buying the goods, what price he would have to pay. If the plaintiffs were to pay \$2.50 a dozen for these goods, and if they could in the open market buy

the same goods for \$2.50, of course they would not be damaged anything beyond mere nominal damages, which is one dollar, by reason of the breach of the contracts.

“On the other hand, if it was necessary for the plaintiffs to pay in the open market \$2.65, \$2.85, or \$2.90 a dozen, the plaintiffs would be damaged the difference between \$2.50 and the \$2.85 or \$2.90 they would have to pay on the open market.”

XXII.

The court erred in giving the following instruction to the jury:

“Now, what was the market value, of course, is an issue for you to decide. For when you once determine what the market value is, you simply deduct from that the price that the plaintiffs were to pay, which will give you the amount of damage on each dozen. Mr. Hoffman, a member of the partnership, testified that at that time, September 12th to October 18, 1924, the price of like goods on the Pacific Coast —these goods are shipped by freight, and perhaps the price in one place would not be very much different from another—was \$2.65 or \$2.90 a dozen, which would be thirty-five or forty cents above the price that Hoffman and Greenlee were to pay to the defendants for the goods.”

XXIII.

The court erred in giving the following instructions to the jury:

“The defendant presented in its behalf, the testimony of Mr. Ribbeck, a member of the company, who testified that in September, 1924, the

price was about \$2.50 a dozen. How much more he does not say. From the standpoint that he is an interested party, you can draw the conclusion—though you are not bound to—that he did not mean anything less than \$2.50. In other words, in the case of all interested witnesses you may consider whether they are not apt to draw the testimony just as favorably to themselves as they can, and, of course, as they deem it consistent with their oath. That would apply also to Mr. Hoffman and his testimony of \$2.85 or \$2.90 a dozen. Mr. Wright, also associated with the defendant, testified that the price during that time, September and October, and even to the first of 1925, was \$2.50, and the highest was \$2.65 a dozen cans. That at the very least is \$2.65, which would be fifteen cents more than the plaintiffs were required to pay the defendant for the goods."

XXIV.

The court erred in receiving the verdict of the jury, which was contrary to the law and the evidence.

XXV.

The court erred in entering judgment against the defendant.

XXVI.

The court erred in overruling the motion of the defendant for a new trial.

ARGUMENT.

We will discuss the questions presented by the several assignments of error under the following heads:

I.

The court erred in permitting the defendants in error to introduce, in rebuttal, testimony which properly was a part of its case in chief.

II.

The court erred in admitting testimony concerning contracts, shipments, and controversies other than those involved in the case at bar.

III.

The court erred in commenting adversely on the testimony of Mr. Ribbeck.

IV.

The court erred in withdrawing the case from the jury except as to the question of damages.

V.

The defendants in error were not the real parties in interest.

VI.

The agreements for the sale of pears were executory agreements without present consideration, and lacking mutuality.

VII.

Even if there was a binding contract, there was no breach of the contract on the part of the plaintiff in error.

VIII.

The measure of damages, if any, is the difference between the contract price and the resale price.

I.

The court erred in permitting the Defendants in Error to introduce, in rebuttal, testimony which properly was a part of its case in chief.

The Defendants in Error, as a part of their case in chief, introduced testimony concerning the grade or quality of the pears submitted, and then after the defense had rested, they were permitted by the court, over objection to introduce further cumulative testimony on the same subjects.

“Rebutting evidence means not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove.” (Jones on Evidence (Third Edition) Sec. 809).

The evidence admitted does not meet this test. We may be asked: “How are you prejudiced.” It is manifest from the decision and oral opinion of the trial judge (Tr. pp. 119, 120, 121) that he gave no consideration whatsoever to any testimony concerning the grade or quality of the pears, of which samples were furnished, inasmuch as he held that the buyer might reject merely on his “sense of taste” (Tr. p. 120). All errors as to testimony on this subject, might therefore be of no consequence, and ineffective for prejudice or otherwise in the

presence of the greater and determining error of holding that there was a binding contract where one party could thus reject a proffered performance.

However, the testimony on market value bears a different aspect. That, under the court's instructions, determined the amount of damages. The amount of damages was left to the jury. It was the only question left to the jury. Under this particular situation, the improper admission of market value testimony in rebuttal would tend naturally to a cumulative and concentrative effect on the jury, greatly to our prejudice.

II.

The court erred in admitting testimony concerning contracts, shipments and controversies other than those involved in the case at bar.

The testimony of R. G. Weston (Tr. p. 113) illustrates our point on this. He was permitted to testify concerning a shipment to London, and its condition on arrival there.

In the absence of proof that they were taken from the same lot, and that conditions of transportation and handling were similar, this is clearly incompetent.

III.

The court erred in commenting adversely on the testimony of Mr. Ribbeck.

The court in its instructions (Tr. p. 128) gave a prejudicial and strained construction and em-

phasis to the testimony of Mr. Ribbeck on market value. The court there says that Mr. Ribbeck testified that the market price was "about \$2.50 a dozen. How much more he does not say." The court plainly gives the jury to understand that, because Mr. Ribbeck is identified with one of the parties to the action, they can, in effect, disregard his testimony; that his testimony does nothing more than fix a minimum, and that the market price might be any indefinite amount above that. The prejudicial emphasis and distinction in this instruction, may be more fully appreciated by comparing the comment on Mr. Ribbeck's testimony with the comment on similar testimony of Mr. Pratt for Defendants in Error. Mr. Pratt testified that the market price was "*about* \$2.90 per dozen" (Tr. p. 69). The court in commenting to the jury on Mr. Pratt's testimony doesn't analyze or explain the meaning of *about*. The court merely discards or disregards the qualifying word and tells the jury that Mr. Pratt testified that these goods "were \$2.90 a case" (Tr. pp. 127, 128).

Our conceptions of the term "*about*" is that it indicates an approximation and in case of market quotations a very close approximation. But conceding that, and conceding that the interest of a party is to be considered in weighing the evidence, was there fair justification for the distinction made in the instruction.

Furthermore, if the jury are advised of the interest of one witness, should it not likewise be

advised of the interest of the other witness whose testimony is compared with his. It is true that Mr. Ribbeck was the general manager of the Everett Fruit Products Co. (Tr. p. 77). But Mr. Pratt was the sales manager for the California Packing Corporation (Tr. p. 67) to whom the "contracts" had been assigned (Tr. pp. 89, 90), and yet that fact was not mentioned in the court's instructions, when the testimony of these two witnesses was thus compared.

IV.

The court erred in withdrawing the case from the jury except as to the question of damages.

We recognize that the Supreme Court has under certain circumstances sanctioned that procedure whereby, even in the absence of written stipulation the court on motion of both parties withdraws the case from the jury, and makes findings on the facts, and has reconciled such procedure with the provisions of Section 649, Rev. St. (1587, Com. St.). The case most frequently cited in support of such procedure is that of *Buetell vs. Magone*, 157 U. S. 154, 39 L. Ed. 654. The court there said:

"The request, made to the court by each party to instruct the jury to render a verdict in his favor was not equivalent to a submission of the case to the court, without the intervention of a jury, within the intendment of sections 649, 700, Revised Statutes. As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed ques-

tion of fact which could operate to deflect or control the question of law.”

The court also said in the course of its opinion:

“There was obviously no disputed question of fact.”

We believe that all subsequent decisions citing this case have been uniform, in stating the effect of the rule subsequently in the language employed by the Supreme Court in *Empire State Cattle Company vs. Atchison, Topeka & Santa Fe Railway Company*. The court said:

“It was settled in *Beuttell vs. Magone, supra*, that where both parties request a peremptory instruction and *do nothing more, they thereby assume the facts to be undisputed*, and, in effect, submit to the trial judge the determination of the inferences proper to be drawn from them.”

Empire State Cattle Co. vs. Atchison, Topeka & Santa Fe Railway Co., 52 L. Ed., 931, 936.

Mr. Justice White delivered the opinion of the court both in the case of *Beuttell vs. Magone* and the case of *Empire State Cattle Co. vs. Atchison, Topeka & Santa Fe Ry. Co.*

The scope and limitations of the rule are accurately stated in the well considered and leading case of *Minahan vs. Grand Trunk Western Railway Company*, 138 Fed. 37; *Empire State Cattle Co. vs. Atchison, T. & S. F. R. Co.*, 52 L. Ed. 931, 936.

In the *Minahan* case, *supra*, the court says:

“In that case (referring to *Beuttell vs. Magone*) there was *no disputed question of fact*

and it only remained for the court to state to the jury what the facts were, and what the law applicable to those facts was. And what the court there held in effect was that the court might state the facts as agreed, and not submit them to the jury. The language of Mr. Justice White, taken apart from the case before the court, might justify the conclusion which the counsel draws from it. But it would seem that the decision cannot be regarded as furnishing a rule for cases where the evidence is conflicting, and where the parties whose request is refused has coupled with his request other requests directed to particular aspects of the case, which repel the implication that the party had consented to a submission of the facts to the court. And in all the cases in which the case of *Beuttell vs. Magone* has been cited in the appellate courts the conditions were the same; *there was no disputed question of fact, and there were no special requests.*"

In the case of *Empire State Cattle Company vs. Atchison, Topeka & S. F. R. Co., supra*, the court adopted the following statement:

"A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted, facts, which, if proved to the satisfaction of the jury, entitles him to a verdict, regardless of the evidence on which he relies in the first place. It cannot be that the practice would not permit him to ask for peremptory instructions, and, if the court refuses, to *then* ask for instructions submitting the other question to the jury. And if he has the right to do this, no request for instructions that his opponent may ask can deprive him of the right."

It seems to be the rule that before the court can pass upon the issues, there must be a request by both parties for a peremptory instruction upon all the issues in the case *without reservation*.

See

Michigan Copper & Brass Co. vs. Chicago Screw Co., 269 Fed. 502, 504.

The limitations and qualifications of the rule and the application thereof to a situation similar to the case at bar are further stated and illustrated in the following cases:

Charlotte National Bank of Charlotte, N. C., vs. Southern Railway Co., 179 Fed. 769;
Farmers' & Merchants' Bank vs. Maines, 183 Fed. 37;
Chesapeake & O. R. Co. vs. M'Kell, 209 Fed. 514;
Breakwater Company vs. Donovan, 218 Fed. 340;
Ewert vs. Fullerton, 225 Fed. 758;
Sampliner vs. Motion Picture Patents Co., 254 U. S. 233, 65 L. Ed. 240.

The cases hereinabove cited would appear to support our contention that before the court can withdraw the issues, or any of them, from the consideration of the jury, each and all of the following elements are essential, and must be present:

- a. That both parties request a peremptory instruction *and do nothing more*.

- b. That the request or submission must be upon *all the issues*.
- c. That the request or submission must be *without any reservation*.
- d. That there must be *no disputed question of fact*.

The underlying theory seems to be that where both parties join in a request for a directed verdict on all the issues in the case, without any reservation, and do nothing more, they thereby evidence an intention or desire that the court withdraw all issues from the jury, and, in effect, stipulate that the issues may be determined by the court.

In the case at bar, we respectfully submit that the court upon denying the defendant's motion should have submitted the case to the jury.

We respectfully submit that the case at bar is not one where both parties joined in a request for peremptory instruction on all the issues, and did nothing more.

What was done by counsel for Plaintiff in Error, and what was done by counsel for Defendants in Error? Counsel for Plaintiff in Error asked for a directed verdict upon three expressly stated grounds or issues, as hereinabove shown. These stated grounds did not include the issue of the quality or grade of the samples furnished, or the issue of the good faith of the Defendants in Error in rejecting the samples, or the issue of the market price of pears. By such omission, these issues were, therefore, excluded from the consideration of the

court. The Plaintiff in Error by this motion did not say in legal effect or otherwise to the court that there were no disputed questions of fact in the case, or that it desired the court to find all the facts in the case. On the contrary, the Plaintiff in Error in and by its motion said, in effect:

(1) "The evidence is undisputed that the contracts have been assigned by the plaintiffs. From this undisputed fact we ask your honor to draw the inference of law that the plaintiffs are not the real parties in interest and that on this ground the defendant should prevail."

(2) "It is an undisputed fact that the pears were resold and there is no evidence that the resale price was higher than the contract price. We, therefore, ask your honor to draw the legal conclusion that no damage is shown and that plaintiffs are entitled to recover nothing."

(3) "The execution of the written agreements and the terms and covenants thereof are undisputed. We ask your honor to determine as a matter of law that these agreements are lacking in mutuality, impose no legal obligation on the defendant and afford no ground for action by the plaintiffs."

Paraphrasing the opinion in *Empire State Cattle Co. vs. Atchison, T. & S. F. R. Co., supra*, we believed that any one of the foregoing facts, covered in our motion, which said facts were proved without conflict or dispute, entitled us to a verdict. But there was evidence of other, but controverted, facts (the quality or grade of the pears submitted, the good faith of the Defendants in Error in rejecting, and the market price of pears) which, if proven to

the satisfaction of the jury entitled us to a verdict, regardless of the evidence on which we relied in the first place.

In addition to the foregoing, special instructions were requested by the Plaintiff in Error (Tr. pp. 121-125). These considerations are sufficient, we contend, to entitle us to a jury trial.

Our position is re-enforced when we consider, in the light of the decisions, what action was taken by counsel of Defendants in Error in asking a directed verdict. In his request counsel for Defendants in Error expressly excepted the question of damages from those issues which we asked the court to pass upon. This reservation stops the request short of that point where it might operate to take the case from the jury. With this express exception incorporated in and as a part of the motion of the Defendants in Error, can it be said that

“Both parties request a peremptory instruction and do nothing more,”

or that the request is without reservation, or that the request is for the court to find upon *all* the issues, or that there is no undisputed fact? The mere statement of the question presents the obvious answer. Can it be said that the request of Defendants in Error embodying such an exception constitutes in any legal or proper sense a joinder in the motion of Plaintiff in Error, or any implied stipulation or joint waiver? We contend that it does not. If a joinder by both parties in a motion for directed verdict, implies in effect any stipulation, any joint

waiver, any joint request or action of any kind, then the minds of both parties must have met and joined. An absolute request by one and a qualified request by the other party, or two qualified requests or requests with differing reservations would not constitute such joinder. As in offer and acceptance, the latter to be effective cannot vary the terms of the offer. It may well be that one party might be willing to have all the issues submitted to the court, but wholly unwilling to have the court pass upon a part only of the issues with the remaining questions left to the jury. Counsel for Defendants in Error might have asked the court to pass on the question of damages and leave all other issues to the jury, or might have asked the court to determine whether the contracts had been assigned and leave all other issues to the jury, or might have asked for any manner of segregation and distribution of some issues to the court and others to the jury. Such course would be on a parity with that pursued here, and in no sense could properly be termed a joinder in the motion of Plaintiff in Error. We are not aware of any case which holds that a motion with such reservation as here employed will effect a joinder to lift the case from the jury, even for the determination of those issues which the court is asked to pass upon.

THE DEFENDANTS IN ERROR WERE NOT THE REAL PARTIES IN INTEREST.

It appeared from the testimony of W. B. Longwell, a witness for the Defendants in Error, that the Defendants in Error had assigned to the California Packing Corporation its contracts with the Plaintiff in Error, and that the California Packing Corporation became the owner of said contracts by assignment. This testimony was not contradicted.

The same witness testified that he had inspected the pears as the agent of the California Packing Corporation, the owner of the contracts (Tr. p. 100). The rule is that actions must be brought in the name of the party whose legal right has been invaded.

Simpkins Federal Practice (Rev. Ed.), page 17.

But where the State prescribes who shall be made parties plaintiff or defendant in any cause cognizable at law, the Federal Courts will conform to the State code or rule.

Simpkins Federal Practice, page 17;
Albany & Rensselaer Iron and Steel Co. vs. Lundberg, 121 U. S. 451, 30 L. Ed. 982.

The Washington code provides that:

“Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law.”

Remington's Compiled Statutes of Washington, Section 179.

From the testimony of the witness Longwell, it appears that the contracts had been assigned, and were in the ownership of the assignee at the time they were breached (if they were breached), and that any right, therefore, which had been invaded was the right of the assignee, and any damage suffered was suffered by such assignee. The action, therefore, could only be brought by the assignee, and Defendants in Error in this action are not entitled to bring or maintain this action.

VI.

The agreements for the sale of pears were executory agreements without present consideration, and lacking mutuality.

The parties agreed for the sale of pears *subject to approval of sample*. There was no consideration unless it was that of a promise for a promise. In effect, the promise of the plaintiffs to buy was conditioned upon their approval of the sample. The promise of the defendant to sell was conditioned upon the plaintiffs' approving the sample and ordering delivery. The plaintiffs were not bound. There was, therefore, a lack of mutuality, and consequently the defendant was not bound.

"Mutuality of obligation is an essential element of every enforceable agreement. Mutuality is absent when one only of the contracting parties is bound to perform and the rights of the parties exist at the option of one only."

This rule has been adhered to in the following recent Federal cases:

Hind, Rolph & Co. vs. Bertaut & Co., 9 Fed. (2d) 191;

Texarkana Casket Co. vs. Binswanger & Co. of Tennessee, 3 Fed. (2d) 611;

Nebraska Gas & Electric Co. vs. City of Stromsburg, 2 Fed. (2d) 518;

City of Pocatello vs. Fidelity & Deposit Co. of Maryland, 267 Fed. 181 (9th Cir.).

“Where the parties assume to make a contract in which a promise is the consideration for a promise, and the alleged contract so worded that one of the promises does not impose any legal duty upon the party making it, such promise is not a consideration for the other promise * * *. This is what is often meant by saying that promises must be mutual.”

Page on Contracts, 2d Ed., Sec. 569, page 963.

The principle is fundamental and has found application in numberless cases. In the State of Washington, it has been held that

“ * * * if the option be given without consideration, it may be withdrawn at any time prior to its acceptance and a tender of performance, but not thereafter, as such acceptance will convert it into a bilateral or mutual contract, binding upon both parties.”

Baker vs. Shaw, 68 Wash. 99, 103.

In Montana, it has been held that

“An agreement to sell wheat which contained no promise of the buyer to accept and where no consideration was paid, is not a binding contract.”

McCaull-Webster Elevator Co. vs. Root, 201 Pac. 319.

By the Circuit Court of Appeals, Ninth Circuit, it has been held that a contract obligating one of the parties to sell to the other in case the latter chose to buy was void for want of mutuality.

“The right of the defendant to buy only in the event it should chose to do so manifestly imposed no obligation on it to do so.”

Long Syrup Refining Co. vs. Corn Products, Refining Co., 193 Fed. 929, 931.

Executory agreements for sale where the quantity to be ordered was conditioned by the will, wish, or want of one of the parties have been held void for lack of mutuality.

Hazelhurst Lumber Co. vs. Mercantile Lumber & Supply Co., 166 Fed. 191;

Cold Blast Transportation Co. vs. Kansas City Bolt & Nut Co., 114 Fed. 77;

Willard, Sutherland & Co. vs. United States, 262 U. S. 489; 67 L. Ed. 1086.

The courts have frequently been called upon to construe agreements in which one party undertakes to perform a service or deliver an article to the satisfaction of the other party. It is said that these agreements

“are ordinarily divided into two classes:

(1) Where fancy, taste, sensibility, or judgment are involved; and (2) where the question is merely one of operative fitness or mechanical utility. In contracts involving matters of fancy, or judgment, when one party agrees to perform to the satisfaction of the other, he

renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such a party should have been satisfied where he asserts that he is not."

13 C. J., Sec. 768, page 675.

"The rule stated in the preceding section is also applied to cases of operative fitness or mechanical utility when the contract clearly provides, that performance shall be satisfactory to the promisor."

13 C. J., Sec. 769, page 676;

McDougall vs. O'Connell, 72 Wash. 349, 131 Pac. 204;

Tatum vs. Geist, 46 Wash. 226, 89 Pac. 547.

The Supreme Court of the State of Washington has adopted the following phraseology of the rule:

"And where there is an agreement that an act shall be done in a manner satisfactory to the promisee, it is generally held that he is the *sole arbiter* of the performance according to the agreement. *It is not enough to show that the promisee ought to be satisfied* and that his discontent is without reason."

McDougall vs. O'Connell, 72 Wash. 349;

Tatum vs. Geist, 46 Wash. 226.

The Circuit Court of Appeals has followed the same rule where a New York contract was involved.

American Music Store vs. Kussel, 232 Fed. 306, 310, 317.

"‘Satisfactory’ in cases of the character under consideration means satisfactory to the promisor, if the contract is silent as to the person to whom the work, etc., shall be satisfactory."

13 C. J., Sec. 769, pages 676, 677.

Under the particular agreements here involved were the Defendants in Error made the "sole arbiters of performance according to the agreement"? We contend that they were so constituted, and that their dissatisfaction could not be brushed aside upon any ground that they "ought to be satisfied." Such being their right to bind or loosen themselves, they were under no obligation which could give rise to any corresponding obligation on the part of the Plaintiff in Error. The promises were illusory, or conditional. There was no mutuality and no valid contract.

What was the purpose of inserting the provision "subject to approval of sample" and what interpretation is to be placed on that phrase? This is not a situation, apparently, where the buyer merely claims a right to inspect the goods to determine whether they conform to the sub-standard grade. He would have that right if the phrase were omitted and the contract silent on the subject.

"As a general rule in the case of an executory contract of sale the buyer is entitled to a fair opportunity to inspect or examine the article or commodity tendered to see if it conforms to the contract and if it does not do so to reject it. * * * It is the general rule that where goods are ordered of a specific quality, which the seller undertakes to deliver to a carrier to be forwarded to the buyer at a distant place, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination; in such a case the carrier is not the agent of the buyer to accept

the goods as corresponding with the contract, although he may be his agent to receive and transport them.”

23 R. C. L., Sec. 256, pages 1432, 1433.

It appears, therefore, that the phrase must have been inserted to confer some additional right on the buyers. Even if the fruit was of sub-standard grade, yet the buyers could require something further of it. That something further was a matter, or quality, or condition known only to the buyers and subject wholly to their determination. It was a matter beyond the control of the seller. This further something might be a matter of the buyers' taste, or a matter of their judgment of the commercial suitability of the article for their particular trade or custom. The reason of determination is immaterial, so long as the act of determination is left solely to the buyers.

The court may observe the following provision in the agreement:

“buyers’ option labels, less usual label allowance” (Tr. p. 63).

From this we infer that the buyers contemplated the possibility of putting these goods on the market either under their own labels, or under some label other than that of the seller, and, in that event, to save themselves a duplicate cost of labels. The buyers might desire either to create or sustain a market for a commodity under a particular label; and to that end they might desire to put forth only a very superior quality within the grade, or only

a particular kind of fruit within the grade, that might appeal to some particular fancy or taste. The fruit may have been intended for domestic consumption, or perhaps for foreign consumption. The foreign consumer might like his pears hard, or firm or soft. He might like big pieces or little pieces, thick syrup or thin, some particular flavor or some other flavor. And under the terms of these agreements the buyers could have rejected any samples for any one of the foregoing or similar reasons, even though up to the grade of sub-standard pears, and the seller could not legally question his decision.

The trial court seemed to be of the opinion that the buyers had such a latitude and such a privilege, when the following expressions were employed in the oral opinion:

“The defendant was to furnish pears of the grade for which he had contracted, and the plaintiffs to take those pears providing they were of that grade *and approved even as it might be to his sense of taste*” (Tr. pp. 119-120).

While it is true that the trial court further said that:

“ * * * he is obliged to act in good faith and have motives of honesty and justice to the other party” (Tr. 120),

yet the mere fact that he must act honestly would not deprive him of his own standard, of his own taste or fancy, and would not subject the buyers' decision to the test of whether it was reasonable or whether he ought to be satisfied. The oral opinion continues the statement hereinabove last quoted, as follows:

“He still has a right to say there is that in the fruit that does not meet his approval * * * ” (Tr. p. 120).

And again in the opinion we find:

“In respect to the sample. The contract contained the term ‘subject to approval of sample.’ A party who contracts in that fashion *leaves the question of approval entirely to the other party*” (Tr. p. 120).

This conclusion is in close harmony with the authorities.

And since the question of approval is left entirely to the buyer, he is not obligated to accept samples tendered, even though of sub-standard grade, and the seller is without redress for the refusal. The buyer is not bound until he says:

“These samples are satisfactory, deliver the pears.” Up to that point the buyer has an option. That option is based on no consideration. Until that option is exercised the seller is not bound.

In many cases, the plaintiff seller has been denied recovery of the purchase price, because the goods were not satisfactory to the defendant buyer. But we are not aware of any case where the buyer, who was to be the sole arbiter of performance, was held to have a right of action against the seller for failure to deliver.

“While, however, the dissatisfaction of the promisor entitles him to refuse payment or performance on his part, it does not entitle him to require the promisee to continue to endeavor to perform until he is satisfied, under penalty in case he ceases such effort of being liable for a breach.”

13 C. J., Sec. 768, page 676.

"In the case of a sale of goods to be accepted or paid for, if 'satisfactory,' the condition is a suspensory one, that is, it suspends the obligation of both parties until the purchasers satisfaction is gained or waived. Hence the fact that the goods are not satisfactory does not give him a right to reject them and claim damages for breach of contract of the seller, as would be the case if there were a warranty that the goods were fit for the purpose and they were not, nor to keep them and recover damages in an action for the purchase price."

9 Cyc. 624.

The application of the rule is well illustrated in an Illinois action brought by the buyer on a contract involving the identical principle here involved.

Joliet Bottling Co. vs. Joliet Citizens Brewing Co., 98 N. E. 263, 265 (Ill.).

Under the written agreement in that case, the Brewing Company was to brew a special beer, and the Bottling Company was to bottle said beer as long as it was of "satisfactory quality" and to pay a stipulated price therefor to the Brewing Company. In the course of performance of the contract, the beer furnished failed in quality, and was not satisfactory to the Bottling Company, which company thereupon secured beer from other sources at great expense and loss of profits. The Bottling Company brought its action against the Brewing Company for damages for breach of contract, setting forth the foregoing facts in its declaration.

The court in affirming the judgment of the lower court sustaining a demurrer to the declaration, said:

"The quality of the beer was to be satisfactory to appellant (the Bottling Co.). Under this provision of the agreement, appellant had the option of refusing to accept beer from appellees at its pleasure upon the ground that it was not satisfactory. *Brown vs. Foster*, 113 Mass. 136, 18 Am. Rep. 463; *Zaleski vs. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *Gibson vs. Granage*, 39 Mich. 49, 33 Am. Rep. 351. It cannot be doubted, we think, that the contract was unilateral and void for want of mutuality under repeated decisions of this and other courts. *Vogel vs. Pehoc*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; *Higby vs. Rust*, 211 Ill. 333, 71 N. E. 1010, 103 Am. St. Rep. 204; *Bailey vs. Austrian*, 19 Minn. 535 (Gil. 465); *Crane vs. Crane Co.*, 105 Fed. 869, 45 C. C. A. 96; *Davis vs. Lumbermen's Mining Co.*, 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357."

VII.

Even if there was a binding contract, there was no breach of the contract on the part of the Plaintiff in Error.

For the reasons herein above set forth, it would seem that there is no legal escape from the conclusion that the agreements sued upon are void for want of mutuality. If, however, the court should arrive at a different conclusion and find that there was a binding agreement, under any construction of the agreement the only promise on the part of the seller would be that it would submit samples

of sub-standard pears of the 1924 pack and if approved by the buyer would deliver the quantity of pears provided for in the agreement. The promise upon the part of the buyer would be that they would inspect the samples submitted and approve or reject the sample, and if approved would accept the quantity of pears provided for in the agreement. The seller submitted samples of its sub-standard pears of its 1924 pack and such samples were inspected by the buyer and rejected. There is no evidence that the goods were not of the sub-standard grade as packed by the seller. The agreement provided and the complaint specifically alleged that the samples to be submitted by the Plaintiff in Error were to be of the sub-standard grade as packed by the Plaintiff in Error for 1924. So when the Plaintiff in Error had submitted samples of this grade of the pack for that year and permitted inspection of such samples at its plant it had performed all of its obligations unless and until the samples submitted were approved by the buyer. The trial court did not determine that the samples submitted or inspected were not of the sub-standard grade as packed by the seller for the year 1924; and it did not determine that such samples were not of the sub-standard grade as established by the Northwest Canners Association, and the jury did not pass upon this question. So that question has never been determined. In the case of *Hurley Mason Co. vs. Stebbins, Walker & S.*, 79 Wash. p. 366, 140 Pac. 381, there was involved a sale of cement subject to

tests. The court at page 373 in discussing the provisions of the contract stated:

"II. Was the provision that the sale was subject to the tests a warranty collateral to the contract, or was it a condition of the contract? The respondent contends that it was a warranty of quality. We do not so construe it. The sale was made 'subject to' the tests. If an inferior article was shipped, the respondent had a reasonable time for inspection and test, and an acceptance or refusal to accept. The sale being subject to the tests, if the material delivered did not meet the tests, then there was to be no sale."

In this case even assuming there was a binding contract the pears were sold subject to approval of sample. Samples were submitted and rejected and it follows that there was no sale and no breach of the agreement on the part of the Plaintiff in Error.

VIII.

The measure of damages, if any, is the difference between the contract price and the resale price.

Witness Longwell testified that the contract had been assigned by the plaintiffs to the California Packing Corporation, which thereupon became the owner of the contracts (Tr. p. 102).

Roy L. Pratt, a witness for the Defendants in Error, testified that the pears represented by the contracts involved in this case were purchased by the California Packing Corporation from Hoffman & Greenlee (Tr. p. 69).

Oscar Hoffman, senior partner of Hoffman & Greenlee, and a witness for the Defendants in Error, testified that the California Packing Corporation bought said pears from Hoffman & Greenlee

"under the same terms and conditions as far as quality is concerned under which I purchased them from the Everett Fruit Products Company" (Tr. p. 67).

There was no testimony to show what the price was on the re-sale by the Defendants in Error to the California Packing Corporation or what the profits would have been.

While the general rule is that where the breach consists in the failure of the seller to deliver the goods sold, the measure of damages is ordinarily the difference between the contract price and the market price, yet where the goods are sold to be re-sold, the measure of damages for non-delivery is the expected profits.

Keen vs. Swanson, 129 Wash. 269.

While it is true that the original purchaser might have a special damage by reason of the persons to whom he sold holding him liable for the losses, yet he could not recover such special damage if he neither pleads nor seeks to recover damage of such character.

Keen vs. Swanson, 129 Wash. 269, 273.

In the case at bar, the resale was shown by the evidence, but there was no testimony of any kind to

indicate the price at which such resale was made or the profits, if any, which had been made through such resale. Neither do the Defendants in Error plead or prove any special damages for their failure to deliver to their assignee under the resale. There is no testimony to show that they incurred any liability by such failure to deliver, and, in fact, the testimony of Mr. Hoffman (Tr. p. 67) indicates that the re-sale or assignment was the same sort of a conditional resale as the original agreement made by the Plaintiff in Error. Mr. Hoffman said that the California Packing Corporation bought the pears under the same terms and conditions, as far as quality was concerned, as he purchased them from Plaintiff in Error. Before the Defendants in Error could establish special damages, it would be necessary to establish that they had been unconditionally bound to the resale purchaser, and had incurred a liability. We contend, therefore, that no special damage is shown, and that no damage was shown by way of loss of profits, which should be the true measure in a case of this sort, and that, therefore, the Defendants in Error failed to establish any damages whatsoever.

WHEREFORE, Plaintiff in Error respectfully urges that the judgment of the trial court be reversed and that judgment in favor of the Plaintiff in Error dismissing the action be directed and entered, or in the alternative that the judgment of the trial court be reversed and a new trial granted.

WILLIAMS & DAVIS,
REAMES & MOORE,

Attorneys for Plaintiff in Error.

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

EVERETT FRUIT PRODUCTS CO., a corporation,
Plaintiff in Error
vs.

OSCAR HOFFMAN, ELWOOD C. BOOBAR and
FRED S. GREENLEE, co-partners, doing business
under the firm name and style of HOFFMAN &
GREENLEE,

Defendants in Error

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION
HON. GEORGE M. BOURQUIN, JUDGE

Brief of Defendants in Error

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HON. GEORGE M. BOURQUIN, JUDGE

Brief of Defendants in Error

STATEMENT OF THE CASE

The Plaintiff in Error's brief presents twenty-five assignments of error, several of which are subdivided,

some with as many as six claims. Of necessity the majority of these assignments deal with error of practice. As the issue on the merits is relatively simple, in aid of clearness we take the liberty of departing from the method of presentation by the Plaintiff in Error and shall discuss first what we deem the issue on the merits and thereafter attempt to answer as many of the assignments of error as we deem material.

Omitting the formal allegations the complaint of the Defendants in Error is as follows:

“III.

“On the 6th day of August, 1924, the plaintiffs herein and the defendant entered into a written contract whereby the defendant agreed to sell and the plaintiff agreed to purchase two thousand (2,000) cases, equalling four thousand (4,000) dozen, size $2\frac{1}{2}$ cans, of canned sub-standard pears at the agreed purchase price of \$2.50 per dozen, less 4% brokerage, to be of the 1924 pack of pears as packed by the defendant, which is a corporation engaged in the canning and sale of fresh fruits and vegetables; the said pears were sold subject to approval of sample and were sold for delivery F. A. S. Steamer, to be delivered when packed, upon the following terms: 2% 10 days, Net 30 days, sightdraft to accompany bill of lading, a true copy of said contract, together with the terms and conditions thereof, is hereto attached, marked Exhibit “A”, and by this reference made a part hereof.

IV.

"That on August 11, 1924, the parties hereto entered into another contract wherein the plaintiff agreed to purchase and the defendant agreed to sell an additional three thousand (3,000) cases, constituting six thousand (6,000) dozen, of canned substandard pears of the same kind and description as mentioned in the foregoing paragraph, the contract for the purchase of which was in the same terms and conditions and on the same form as the foregoing mentioned contract, hereto attached, marked Exhibit "A", differing therefrom only as to the date thereof, the amount of pears to be sold thereunder, which said contract had this additional condition stated on the face thereof, to-wit: subject to *pro rata* delivery.

V.

"That the defendant's 1924 pack of pears was ready for delivery on October 1, 1924, but the defendant failed and refused to tender to the plaintiffs or submit samples to the plaintiffs of any of the cases or cans of pears of the quality and kind contracted for in the foregoing contracts, although requested and demanded so to do, to the damage of the plaintiffs herein in the sum of * * * \$4,000.00."

The material parts of the contract referred to in the complaint are as follows:

"EXHIBIT A."

"Everett Fruit Products Co.

Everett, Washington.
Contract Form
No. 260

No. 2798

SELLS TO

Aug. 6, 1924

Hoffman Greenlee, Buyer
of San Francisco, Cal.

Consign to-----

Goods specified as per con-
tract on reverse side

Destination -----

Walter C. Zinn Co.,

Broker,

San Francisco, Cal.

Routing -----

Address -----.

Time of Shipment
when packed -----

Sign on Reverse Side.

Cases	Dozens	Size	Grade	Variety	Brand
2000	4000	No. 2 $\frac{1}{2}$	Sub. Std.	Pears	

Price per doz.	Do not use these columns
\$2.50	

Less 4% Brokerage

1924 pack

subject approval sample

Price F. A. S. Steamer, Everett, Wash.

TERMS: 2% 10 days N-30

S-D; B-L

If for export, $\frac{1}{2}$ of 1% swell allowance.

If buyers labels, usual label allowance.

Wood cases.

Buyer's Copy.

FRUIT AND-OR VEGETABLE CONTRACT

As Per Specifications on Reverse Side

TERMS OF PAYMENT. Cash less 2%, payable in New York or Seattle exchange when paid within ten days or on receipt of invoice with documents.

MARINE INSURANCE. * * *

CONDITIONS. The prices specified are for goods "Free on Board" at factory. The seller reserves the routing of freight. Goods at risk of buyer from and after shipment although shipped to seller's order.

If seller should be unable to perform all its obligations under this contract by reason of a strike, fire or other circumstances beyond its control, such obligation shall at once terminate and cease.

In case of short pack by reason of which seller is unable to make full delivery of any of the grades specified, it is mutually agreed that deliveries are to be prorated.

Goods to be shipped at seller's discretion as soon as practicable after packing unless otherwise specified.

FRUITS remaining unshipped * * *

SWELLS * * *

GUARANTEE. Seller guarantees goods covered by this contract to conform with the requirements of the National Food and Drugs Act of June 30th, 1906, except seller is relieved from any responsibility for misbranding when goods are not shipped under its labels.

This contract to be binding upon the seller must be confirmed in writing by the seller, who, however,

shall not be responsible for the performance thereof, unless a copy properly signed by the buyer is delivered to the seller within 20 days of the date thereof.

ARBITRATION. Any dispute arising as to the proper fulfillment of this contract, to be settled by arbitration, by the regular canned goods and dried fruit arbitration boards, either in the cities of New York, Chicago, San Francisco, or Portland, unless otherwise mutually agreed upon. If question is as to quality, actual samples to be drawn and submitted to such board as selected, their decision to be binding upon both parties to this contract. Party against whom decision is rendered, shall pay arbitration fees and expenses incurred. If decision is rendered that seller has complied with contract, invoice if unpaid shall become due and payable at once. If decision is rendered against seller, arbitrators shall determine amount of allowance, which amount shall be payable at once. If the arbitrators decide the seller has not shown good faith in making delivery hereunder, the buyer shall be entitled to another tender in full compliance of this contract. No unimportant variation in the execution of this contract shall constitute basis for claim.

Buyer HOFFMAN & GREENLEE.
C. C. BOOBAR.
EVERETT FRUIT PRODUCTS CO.,
Seller.

By F. B. WRIGHT.

Broker _____."

The Plaintiff in Error's answer (Tr. p. 10) "denies that the defendant failed or refused to deliver

to the plaintiffs or submit samples to the plaintiffs of any of the cases or cans of pears of the quality and kind contracted for in the contracts referred to in said complaint, and denies that the plaintiffs were damaged in the sum of Forty Cents (40c) per dozen cans," and affirmatively alleges in substance:

"The corporate capacity of the plaintiff in error and that it was engaged in the business of canning and selling fruit at Everett, Washington; that during the season of 1924 at its plant in Everett it canned pears of a grade called 'Sub-Standard'; that this grade was the grade covered by the agreement; that after the said grade of pears was so packed it delivered to Hoffman & Greeley samples of such grade of pears and that they had the pears so packed inspected at its plant at Everett and that Hoffman & Greeley failed and refused to approve such samples and rejected the samples, and refused to approve the pears as packed by it after inspection, and failed and refused the pears and order delivery thereof. (Tr. p. 11.)

The Defendant in Error denied the affirmative matter by reply. (Tr. p. 13.) At the close of the testimony in the case both parties moved for directed verdict (Tr. 117 to 19). The trial court determined the laws of the case as follows:

"The contract in this case is a contract for the purchase of a certain amount of canned pears of a well-known and standard grade in the trade, called sub-standards or seconds. Taking the contract as a

whole, it is very apparent that both parties intended it in good faith and by them each to be performed in good faith. The defendant was to furnish pears of the grade for which he had contracted, and the plaintiff to take those pears providing they were of that grade and approved even as it might be to his sense of taste.

"In respect to the sample. The contract contained the term 'subject to approval of sample'. A party who contracts in that fashion leaves the question of approval entirely to the other party. He is not obliged to do it. The evidence in this case is that they did, however, for the defendant shipped those samples down to San Francisco to Zinn & Company and by Zinn & Company they are submitted to the plaintiff. You leave the question of approval then of the material to be furnished in the contract entirely to the buyer as was done in this case. Of course, there is a reason why the Plaintiff did want samples before it accepted the goods. The goods were to be packed in Washington and the plaintiff's home office, at least so far as it appears, its only place of business was in San Francisco and it desired to inspect the fruit at least that far before it consented to receive it and hence this stipulation as to the approval of the sample. The law in reference to that is this:

"It is a binding contract and the parties leave it to the buyer to say whether he will approve the sample, but he is obliged to act in good faith and have motives of honesty and justice to the other party. He still has the right to say there is that in the fruit that does not meet his approval and that rejects it and he would still be entitled as the Court views it in

this case to recover his damage. It is not a question of whether the pack would be sufficient to satisfy the contract because the buyer in this case stipulated that he should be satisfied with the sample. In other words, if the sample would not please him and if he acted in good faith, not from any dishonest purpose, and found the goods did not come up to the standard, his judgment is final and conclusive and could only be impeached if there was evidence in the case to warrant the jury to find that the buyer, namely the plaintiff in this case, was acting in bad faith and should have been satisfied where he said he was not satisfied.

"For these reasons the Court will grant the motion of the plaintiff for directed verdict and will deny a like motion for the defendant. That is to say, the plaintiff is entitled to recover. How much he is entitled to recover will be left for the jury to determine." (Tr. 119-121)

ARGUMENT.

I.

WERE THE CONTRACTS WITHOUT CONSIDERATION AND LACKING IN MUTUALITY.

After careful study of many cases we feel unable to state the law of this case more clearly than did the Trial Judge in the foregoing decision on the motions for directed verdict. The following addition,

suggestions and authorities seem to us to amply fortify his lucid statement of the law.

If the contracts in this case had not contained the clause "subject to approval of sample" there can be no doubt but that the contracts would have satisfied every requirement of consideration and mutuality. No authority is suggested to the contrary.

Dement Bros Co. vs. Coon, 104 Wash. 603, 177 Pac. 354.

All witnesses for both parties agreed that "Sub-standard" described a canned pear of well defined qualities in the trade. The contracts therefore calling for sale of "Sub-standard" pears entitled a buyer to reject pears that inspection showed did not conform to this quality. A suit for damages for breach of contract to deliver pears of this quality, for rescission if the purchase price had been paid, or for breach of warranty had the goods been accepted and protest made of their quality would have been maintainable by the defendant in error except as the provision in the contract "subject to approval of sample" may modify these general principles of law:

Jolly vs. Blackwell & Co., 122 Wash. 620, 211 Pac. 748.

Peterson vs. Denny-Renton Clay & Coal Company, 89 Wash. 141, 154 Pac. 123.

Springfield Shingle Company vs. Edgecomb Mill Company, 52 Wash. 620, 101 Pac. 233.

Burgner-Bowman Lbr. Co. vs. McCord-Kistler Mercantile Co., 216 Pac. 815, 35 A. L. R. 242 and note.

The provision in the contract that samples must be submitted for approval clearly was intended as a method of inspection of the goods offered in fulfillment of the contract. This is well stated in an early case decided by Judge Sawyer of this circuit in *Silsby Manufacturing Co. vs. Towner of Chico*, 24 Fed., p. 893. The learned Judge stated:

“The only question in the case upon which I have any difficulty arises out of the following provision of the contract: ‘The Salsby Manufacturing Company will send the above described steam fire engine to Chico, subject to the approval of the fire committee and will warrant the workmanship finished and performance of the machine satisfactory to them or remove the same without expense, etc.’”

“The authorities are abundant to the effect that upon a contract containing a provision that an article to be made and delivered shall be satisfactory to the purchaser it must be satisfactory to him or he is not required to take it. It is not enough that he ought to be satisfied with the article, he must be satisfied or he is not bound to accept it. Such a contract may be unwise, but of its wisdom the party so contracting is to be his own judge and if he deliberately enters into such an agreement he must abide by it. To this effect are *McCarren vs. McNulty*, 7 Gray, 139; *Brown*

vs. Foster, 113 Mass., 136; *Zaleski vs. Clark*, 44 Conn., 218; *Gibson vs. Cranage*, 39 Mich., 49; *Gray vs. Central Ry. Co.*, 11 Hun. (N. Y.) 70; *Hallidie vs. Sutter St. R. Co.*, 63 Cal., 575; *Heron vs. Davis*, 3 Bosw., 336; *Wood Machine Co. vs. Smith*, 50 Mich., 570; S. C., 15 N. W., Rep., 906; *Hoffman vs. Gallagher*, 6 Daly., 42."

In the case of *Livesley vs. Johnston*, 45 Or. 30; 76 Pac. 13; 106 Am. S. R. 647; 65 L. R. A. 783, Judge Wolverton, while a Supreme Justice in Oregon, wrote the opinion in a case involving a suit for breach of contract by a buyer of 2,000 pounds of hops, where the seller had refused to deliver, claiming that the contract lacked mutuality because of a clause therein which allowed the buyer or his agent to determine whether the hops tendered were of the grade required by the contract. The Court in part said:

"Ordinarily the purchaser of a commodity has a right of inspection upon delivery before acceptance and if it does not correspond in kind, quality, condition or amount to that which is purchased or contracted for, he may reject it. (Citing Benjamin and Mecham on Sales.) The purchaser is conceded the exercise of his judgment, but he exercises it at his own peril, and, if he rejects the commodity, which nevertheless comes up to the stipulated standard, he is yet bound for the purchase price, and the seller may recover it of him on proof that he has complied with the terms of the sale. Many cases are to be found where work is agreed to be done, articles furnished, or goods delivered upon sale, to the satisfaction of an-

other, and it is uniformly held that the person to be benefited may exercise his choice of rejection or acceptance, without assigning any reason therefor. That he ought to be satisfied, or that the work, articles, or goods would be satisfactory to a reasonable man or to a court or jury, will not avail as against the exercise of his convictions of sentiment. It is sufficient that he is not satisfied, and his own determination must be taken as final and conclusive."

The court then reviews the various holdings and concludes as follows:

"Within the undoubted doctrine of these cases, the contract under consideration was one which the parties had a right to enter into, and the clause leaving the quality and condition of the hops at the time of delivery to the judgment of the buyer does not render it void of mutuality. Livesley & Co. could not reject the hops upon mere whim or sheer volition, but must in good faith exercise an honest judgment in the premises, and unless they, by themselves or through their agent so rejected them they would nevertheless be bound for the price."

District Judge Bellinger in *Lilienthal Bros. vs. Stearns* in 121 Fed. 197, held that the buyer's complaint for breach of contract on a similar hop contract stated a cause of action.

Again in the case of *Lehman vs. Salzgeber*, 124 Fed. 479, Judge Bellinger held a contract of this form binding and the subject for an action for damages by the

purchaser where the seller failed to deliver the hops according to agreement.

Judge Lurton, while sitting in the Sixth Circuit with Justices Taft and Severyns in *Michigan Stone & Supply Company vs. Harris*, 81 Fed. 928, held a contract enforceable which required that a transcript of the proceedings showing the legality of an issue of bonds to the satisfaction of the purchaser's attorney did not lack mutuality. As usual of the learned Judge's decisions, the case contains a careful and excellent statement of the law with reference to situations similar to the present one.

Justice Shelby of the Fifth Circuit in the case of *Parlin & Orendoff Company vs. Greenville*, 127 Fed. 55, also has made a careful statement of the law involving the same principle and interpreting a contract of the same general meaning as there is involved in the present suit.

See also *Preece vs. Wolford*, 246 S. W., 27 (Ky.)

The applicable principle is thus announced in 13 C. J., p. 337 Contracts, Sec. 184, "The right of one party to determine whether or not services, goods etc., tendered under the contract are satisfactory or such as he will accept, will not render the contract unilateral where the right so conferred by the contract cannot be construed as giving a permission to reject arbitrarily."

The plaintiff in error deals with this phase of the case under sub-division 6, p. 34, of its brief. The cases cited, with one possible exception, have no application to the facts of this case. The majority of the cases cited merely are written offers that if a buyer decides to purchase of the seller that the seller will sell at a certain price. The exact limitations on this doctrine are immaterial to the present issue.

The remainder of the citations are given over to the proposition that *if a buyer can arbitrarily, for mere whim, reject a tender of performance*, by a seller on the ground that he is not satisfied, that then the contract lacks mutuality. The Washington cases of *Taton vs. Geist*, 46 Wash. 226; 89 Pac. 547; and *McDougall vs. O'Connell*, 72 Wash. 349; 131 Pac. 204, illustrate this principle, but these cases must be read in conjunction with *Yarno vs. Hedlund Box & Lumber Company*, 129 Wash., 457; 225 Pac. 659; and *Gould vs. McCormick*, 75 Wash., 61; 134 Pac. 676, to understand the rule in this state with respect to what should satisfy a contracting party and to what character of contracts the principles apply.

If this principle does not apply to such work as the preparation plans of buildings as held in the *Gould* case, it would seem strange that it should apply to "Sub-standard" pears whose quality and character-

istics, all witnesses agreed, were thoroughly established in the trade.

The only case cited by the plaintiff in error suggesting a contrary view is *Joliet Bottling Company vs. Joliet Citizens' Brewing Co.*, 98 N. E. 263 (Ill.) This case is distinguishable because it involved a contract for furnishing a beer not of a particular standard quality, but of the defendant's brew, which was to be satisfactory to the purchaser. Fancy and taste, even whim, of the purchaser may have been intended as a guide. The portion of the decision quoted in the brief, however, has been severely criticized, particularly by Prof. Williston, in his treatise of contracts, p. 75, where he says there is no warrant for the statement in this case that the purchaser could reject at its pleasure.

Another case cited under sub-division 7, of the plaintiff in error's brief, at page 44, *Hurley-Mason Company vs. Stebbins-Walker*, 79 Wash. 366, 140 Pac. 381 is urged for the proposition that when samples were rejected, even if there were a binding contract in the first place, that the contract was terminated and no action for damages follow. We submit that this is an incorrect interpretation of the *Hurley-Mason* case and, in any event, the case has no application to the present situation. The issue in the *Hurley-Mason* case was this:

A dealer contracted to sell cement, subject to elaborate tests. The purchaser accepted the cement without making the test and later attempted to sue for damages, claiming that the provision in the contract for tests was a warranty that the cement would meet these tests. There was no claim by the buyer that the material furnished was not the grade of cement called for by the trade name under which it was purchased. The Court points out repeatedly that the action is between a dealer and purchaser and not a manufacturer and purchaser, and if the case is at all applicable, it stands for the proposition that if the buyer accepts without inspection or after inspection fails to notify the seller of the defect, that he cannot complain against the seller for poor quality of the cement delivered. If the principles announced in the *Hurley-Mason* case should be applied to the facts of the present case when the samples were tendered to the defendant in error, if the defendant in error had accepted the samples it could not later complain of the quality of the pears. The contracts in the present case, however, provide that any dispute arising over the proper fulfilment of the contracts, including questions as to quality, shall be settled by a particular method of arbitration. This provision of arbitration, if the *Hurley-Mason* rule is applicable, must therefore mean that disputes as to the quality of samples shall

be submitted to arbitration. This the defendant in error repeatedly requested and the plaintiff in error steadfastly refused to concede. (Plaintiff's Exhibit E-1, Tr. p. 55.)

There is a further reason which shows that the contract in the present case is not one involving mere fancy or taste of the purchaser of the pears. The arbitration clause just quoted provides for an arbitration of quality by the Board of the regular canned goods and dried fruits arbitration boards, sitting in certain cities. If a dispute arose, the contract itself took the matter of the determination of the quality of the goods offered out of the buyer's hands and placed it in a well known trade board.

On the legal interpretation of the contract we therefore submit that the trial court came to an exactly correct conclusion.

MEASURE OF DAMAGE

On page 45 of the plaintiff in error's brief, under sub-division 8, it is urged that the instruction as to the measure of damage is incorrect. This is based on testimony that the defendant in error had re-sold the pears to the California Packing Corporation on the same terms and conditions so far as quality was concerned. The Washington case of *Keen vs. Swanson*,

129 Wash. 269, is the plaintiff in error's sole reliance in support of this proposition. Your Honors have already determined the proper measure of damage applicable in this form of action.

Stetson Post Lumber Company vs. Commercial Sash & Door Company, 299 Fed. 553 (9th Circuit). The Supreme Court of the State of Washington has applied the identical measure of damage applied by trial court in the following cases:

Stimson Mill Co. vs. Rogers Mylroie Lumber Co., 115 Wash. 589, 197 Pac. 919.

Coast Fir Lumber Co. vs. Puget Sound Mills & Timber Co., 117 Wash., 515, 201 Pac. 747.

National Steel Car Corp. vs. Schwager & Netleton, 124 Wash. 557, 214 Pac. 1049.

Meyer Brothers Drug Company vs. Campion, 120 Wash. 378, 207 Pac. 670.

Pearce vs. Puyallup & Sumner Fruit Growers' Canning Co., 117 Wash. 612, 201 Pac. 905.

Sussman vs. Gustav, 116 Wash. 275, 199 Pac. 232.

In the present case the testimony shows that there was an existing market for "Sub-standard" pears on the Pacific Coast and at Everett, Washington, at the time for delivery stipulated in the contract. The evidence nowhere shows that the defendant was advised

until after the contract of sale was executed that the plaintiffs were intending to re-sell the pears.

The case of *Keen vs. Swanson*, cited by the plaintiff in error, involved the sale of a particular kind of canned clam which were purchased for re-sale to the knowledge of the seller, which could not be replaced on the open market and in final analysis is simply one of those cases of an absence of proof of a better measure of damage the re-sale price was taken. The case was prosecuted to the Supreme Court without representation of the buyer by counsel and, if interpreted as the plaintiff in error desires, is in direct conflict with two other decisions of the Supreme Court, one an *en banc* decision:

Coast Fir Lumber Co. vs. Pg. Sd. Mills & Timber Co., 117 Wash. 515.

Stimson Mill Co. vs. Roger Mylroie Lumber Company, 115 Wash. 589.

The inapplicability of the rule claimed by the plaintiff in error is well illustrated in the following N. Y. cases:

Finkelstein vs. Selwitz, 139 N. Y. S. 122.

Lowenstein vs. Hargraves Mills, 125 N. Y. S. 1090.

McManus vs. American Woolen Co., 110 N. Y. S. 680.

Judge Learned Hand in *Mitsubishi Shoji Kaisha vs. Davis*, 291 Fed. 882, considers the measure of damage as applied to a shipment of steel rails and there held that the difference between market value and contract price and not the difference between contract price and resale price govern the measure of damage. Certain New York decisions were claimed to state a definite rule, but the court said:

"I think it very doubtful in any event whether, if there had been no market price, the plaintiff could recover more than the value at the time of delivery. In such matters this court, while always treating the decisions of the New York courts with that deference to which they are in fact so well entitled, does not regard them as in any sense authoritative; the question being one of general law. Unquestionably when the cause sounds in contract the general rule is that to recover special damages the buyer must allege and prove that he advised the seller of an existing contract which he needed the goods to fill, and that it is not enough merely to show that the seller knew that the buyer intended them for resale."

See also *Howard Supply Co. vs. Wells*, 176 Fed. 512.

GRANTING MOTION FOR DIRECT VERDICT.

On page 25 of Plaintiff in Error's brief it is urged that the Court erred in withdrawing the case from the jury except to the question of damages.

There was conflicting testimony as to the market value of the pears at the time for delivery. There was no conflict in the testimony on any other material issue. The samples that were offered the defendant in error were drawn at Everett by the plaintiff in error and sent by parcel post to Zinn & Company in San Francisco (Tr. p. 115). A part of these samples were cut in Zinn's office about September 12th and the remainder were given to Hoffman & Greelee (Tr. 53-4). When the first samples were cut Zinn & Company wired the plaintiff in error that evidently they had sent the wrong samples of "Sub-standard" pears for they cut very poor pieces and soft, and should have gone into pie. (Plaintiff's Exhibit E, Tr. 54.) Zinn, the plaintiff's broker was not questioned by the plaintiff in error to contradict in any way the testimony of Hoffman that the cans cut in Zinn's presence were in fact not Sub-standard pears. Hoffman testified that the pears were not up to grade. (Tr. 64 and 65.)

Pratt, sales manager for the California Packing Corporation (Tr. 68), Dodd, manager of the quality and service department of the California Packing Corporation (Tr. 71), Beesemyer, an independent merchandise broker (Tr. 74), on direct examination. Jacobs, manager of the California Canneries Company (Tr. 106), Frey, sales manager of the Cali-

fornia Canneries Corporation (Tr. 109), on re-direct examination, all had examined and cut part of these samples and all agree that the samples were far below "Sub-standard" grade. There is not a syllable of testimony in the record to dispute this fact and nothing to indicate but that the defendant in error exercised its best and honest judgment in passing on these samples. In fact, the plaintiff's own manager on rebuttal testified that samples of pears sent through parcel post were often badly broken up (Tr. 116), indicating that although the entire remainder of the plaintiff in error's pack might be up to sub-standard and that these samples themselves might have been sub-standard grade when they left Seattle that when inspection was made in San Francisco they would have become disintegrated so as not to show compliance of the bulk of the goods to the quality called for in the contract.

The only testimony that could possibly be considered as an attempt to meet the issue of whether the samples submitted were up to grade was testimony of defendant's officers that they inspected the pears packed to this grade daily and that the general pack came up to the requirements. This sort of testimony we submit could not overcome the positive testimony of the men who examined the samples submitted and made no issue for the jury except the ques-

tion of damages. If we are correct in this, the trial court did not err in submitting to the jury only the question of damage.

If we are in error in this the court should then consider whether the motion for direct verdict made by the plaintiff in error and joined in by the defendant in error did not entitle the trial court to take all matters of fact from the jury in any event. There can be little doubt that where both parties join in a motion for directed verdict in the Federal Courts that the trial court is warranted in deciding issue of fact.

The question here is, how long after the court has announced his decision of the case is the losing party given in which to change his mind and request a submission of some issue of fact to the jury?

The plaintiff in error in the present case after the trial court had decided the law of the case and directed the verdict for the defendant took the usual general exception (Tr. p. 121). The argument to the jury followed the court's ruling for motion for directed verdict. The court then instructed the jury as to the measure of damages and at the close of the instructions the counsel for plaintiff in error took his exceptions. The court then directed the clerk to let the records show that the instruction which the court as counsel stated did not

give, and to which he accepts, were presented to the court, laid on the bench after the court had ruled on the motion with respect to the verdict (Tr. 132-33), and the court noted upon the request of instructions that they were laid on the bench after the court determined the parties' motions, each for direct verdict (Tr. 122).

Obviously there must be a time in every law suit when the right to further ask leave to go to a jury on particular issues may be denied. We think the trial court's action in the present action is entirely justified, even if there were an issue of fact for the reason that there was no reservation of any issue of fact in the plaintiff's motion for directed verdict and because a request was untimely.

In *Orr vs. Waldorf-Astoria Hotel Company*, 291 Fed. 343, the court said:

"At the close of the trial both sides moved for an instructed verdict. Plaintiffs in error now say that under the rule laid down in *Williams vs. Vreeland*, 250 U. S. 295, *Empire Cattle Co. vs. Atchison*, 210 U. S. 1, and *Beuttell vs. Magone*, 157 U. S. 154, their motion reserved the right to go to the jury if it should be overruled, that it was not a final submission of the cause on their part. We cannot assent to this. Their motion was put in writing. It embodies stated reasons why it should be sustained, and that part of it entitled, 'Motion to Take from Jury,' and 'Objection,'

contains nothing more than additional reasons in support of the motion. Moreover, we are of opinion that if the case had been submitted to the jury and they had found in favor of plaintiffs in error, it would have been the duty of the court to set the verdict aside."

In *Mayes vs. United States Trust Company*, 280 Fed. 25, the court says:

"The record indicates that its (the defendant's) motion for directed verdict was unaccompanied by request for specific instructions in case the request for directed verdict was denied. By these mutual requests for directed verdict the parties submitted to the trial judge the determination of the inferences proper to be drawn from the facts submitted, and upon this review the court's conclusion of fact must stand, if the record discloses any substantial evidence to support it."

In the foot note to this decision particular reference is made to the case of *La Crosse Co. vs. Pagenstecher*, 253 Fed. 46, there summarized as follows:

"After verdict had been directed for plaintiff, but before the jury had retired, defendant presented further requests to charge, which were denied as coming too late. This ruling was proper. After the court, upon a valid submission for the purpose, had announced its conclusion upon the facts, it was too late to insist upon submission to the jury. Had defendant accompanied its motion to direct verdict with request for specific instructions in case its motion to direct were denied, or had plaintiff not also simultane-

ously presented motion to direct verdict in its favor, the situation would have been different. Breakwater Co. vs. Donovan, 218 Fed. 340; Michigan Co. vs. Chicago Co., 269 Fed. 503."

See also *Thomas-Bonner Co. vs. Hooven Co.*, 284 Fed. 386; *Speelman vs. Iowa State Traveling Men's Association*, 4 Fed. (2nd) 501.

We do not believe the cases cited by plaintiff in error conflict in any way with these decisions.

THE DEFENDENTS IN ERROR WERE NOT THE REAL PARTIES IN INTEREST.

On page 33 of plaintiff in error's brief it is claimed that the defendant in error was not the party in interest. On cross examination Mr. Longwell, sales director of the California Packing Corporation, was asked if Hoffman & Greelee had assigned the contracts to the California Packing Corporation, and answered "yes." But it will be noticed that the questions were leading in form and it is obvious that Mr. Longwell misunderstood their meaning and only intended to testify that the California Packing Corporation had purchased the goods covered by the contract for he testified in another place, "I stated that I was there (at Everett) to inspect pears in the interests of the California Packing Corporation that had been purchased from Hoffman & Greelee, provided they had

samples of lot of second pears to submit to me." (Tr. p. 100.) Hoffman, one of the plaintiffs (Tr. p. 67), Pratt salesmanager of the California Packing Corporation, Tr. p. 69), both testified that canned pears were purchased from Hoffman & Greelee on the same terms and conditions so far as quality was concerned.

We therefore insist that there is nothing rising to the dignity of evidence in the record indicating any actual assignment by the plaintiffs of these contracts to the California Packing Corporation, and in any event its managing officers by their testimony have sufficiently estopped themselves from asserting title to the contracts by taking part as witnesses herein.

The only other arguments presented in support of its twenty-six assignments of error by the plaintiff in error we think necessary to answer are as follows: The order of admitting testimony (Sub-Division 1, p. 22), Brief of Plaintiff in Error. The Defendant in Error of necessity had to rely largely on depositions. Portions of the depositions dealt with the plaintiff's case in chief, while portions were strictly rebuttal. Under these circumstances it was difficult to maintain the proper order of proof, but we submit that no prejudice resulted to the Plaintiff in Error from departing from the usual course of proof.

On page 23 of its Brief, under sub-division 2, it is urged that Weston's deposition was improperly submitted. This testimony, while not proper under the plaintiff's theory of the case, was competent to meet the issue as the Plaintiff in Error attempted to broaden it. As the matters testified to by Weston were not submitted to the jury, no prejudice is conceivable.

Again on page 23 of its Brief plaintiff objects to the court's comment on Ribbeck's testimony. We submit there was no improper comment. Ribbeck emphasized at two different times that the price of \$2.50 per dozen, that he fixed as a market price, was *about* the price. He disclaimed knowledge of the market after the middle of September. Wright, his immediate superior, placed the market 15c a dozen higher than Ribbeck at the same time. There were but two witnesses for the defendant who testified to the market price, both were officers of the corporation, while the defendant in error produced six witnesses, some, entirely disinterested, all of whom placed the market at approximately \$2.85 per dozen. Another significant fact is that the Plaintiff in Error called Chas. Allen, who was engaged in buying canned fruit for twenty years on the Seattle market, and while he testified as to samples cut from the Everett Company's pack he was not asked and did not attempt to

give testimony as to market. Nor was the plaintiff in error's broker Zinn asked of the market.

We therefore respectfully submit that the trial of these causes was conducted without substantial error, that contracts were properly interpreted and the judgment entered on the verdict of the jury should become final.

Respectfully submitted,

KERR, McCORD & IVEY, E. S. McCORD, JR., AND
WM. Z. KERR,

Attorneys for Defendants in Error.

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

7

No. 5020

EVERETT FRUIT PRODUCTS CO., a corporation,
Plaintiff in Error
vs.

OSCAR HOFFMAN, ELWOOD C. BOOBAR and FRED
S. GREENLEE, copartners, doing business under the
firm name and style of HOFFMAN & GREENLEE,
Defendants in Error

Petition for Rehearing

FILED
APR 18 1927

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**United States Circuit Court
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S. GREENLEE, copartners, doing business under the
firm name and style of HOFFMAN & GREENLEE,
Defendants in Error

Petition for Rehearing

The defendants in error, feeling themselves aggrieved at the decision of the Honorable Court in the above entitled cause, respectfully petition for rehearing of the cause and in event rehearing is denied that Your Honors modify your decision in the respects hereinafter pointed out.

The defendants in error respectfully submit that the court has incorrectly decided the question of practice involved where both parties move for directed verdict in this particular case through an inaccurate reading of the portions of the transcript of record where this question appears.

The plaintiff in error's motion for directed verdict was made at the close of the testimony (Tr. p. 117). The motion was followed by an argument of counsel for plaintiff in error. At the close of that argument counsel for the defendants in error joined in the motion and argued his position to the trial court. Counsel for the plaintiff in error, so far as the transcript shows, made no attempt to meet the argument of counsel for the defendants in error, although from the form of counsel's motion and his argument he must have known that counsel for the defendants in error was contending that the entire issue, both of law and fact, was to be submitted to the trial court and taken from the jury. The trial court proceeded to decide the question on this theory and counsel for the plaintiff in error at the close of the decision merely stated, "Save an exception, your Honor." (Tr. p. 121.)

The counsel for the plaintiff in error in their transcript has next placed instructions requested by

the defendant, but what actually occurred at the trial is shown on pages 125 to 133 of the transcript as follows:

The court immediately after ruling on the motions for directed verdict, without any objection, except the formal exception by counsel for the plaintiff in error, proceeded to instruct the jury as to the measure of damages and other formal instructions. At the close of these instructions counsel for the plaintiff in error proposed to take exceptions to the court's instructions and refusal to instruct and when he had finished the court made the following statement:

"Let the record show the instructions which the Court, as counsel states, did not give, and to which he excepts, were presented to the Court, laid upon the bench, after the Court had ruled upon the motions in respect to the verdict." (Tr. p. 132.)

And this is the endorsement which the court also made on requested instructions. (Tr. p. 122.) Obviously the requested instructions were not called to the court's attention until the court had not only finally determined the motions for directed verdict but had proceeded with the trial and given the jury its general instructions on the only issue which the court and counsel for the defendants in error considered still open.

Your Honors, of course, will concede that there is some point at which the right to submit issues to a jury must terminate. We submit that it is unfair to the trial court and to the parties for one party to sit by, await the rulings of the court on a motion to decide the facts, which from the form of the motion it could not possibly understand would result in anything but a final determination of the facts and the law of the case and after the motion has been denied still further sit by, allow the court to complete his instructions on the only matter left for the jury and then for the first time proceed to reopen the question of fact and ask its submission to the jury.

Every case cited by your Honors in support of your decision shows a clear reservation and request to the trial court prior to the court's final ruling on the motions to reserve to the party the right to submit issues of fact to the jury in event of a denial of the motion.

On the other hand the decisions set out in the defendants in error's brief show clearly that the federal practice is well recognized that after both parties have submitted to the ruling of the court of the motion for directed verdict, that the party can no longer insist that he has not waived his right to submit issues of fact to the jury.

While it is true that the plaintiff's motion, with his reasons given, might well have been construed as not an intention to submit issues of fact to the trial court, it is beyond the possibility of construction to say that the motion of counsel for the defendants in error did not request the court to decide the entire case. The record is conclusive that the plaintiff in error made no objection to such a submission until it found that the court's decision was adverse to it, and even then it failed to enlighten the court as to any desire on its part to submit the facts to the jury until the court had entirely completed its instructions and was about to send the jury out for its deliberation.

We, therefore, urge Your Honors to reconsider this portion of your decision and not to announce a precedent which nullifies the trial court's decision on joint motions for directed verdicts. There can not be the least doubt that if this portion of the opinion is not modified that in every case where parties join in motions for directed verdict, no matter how earnestly they lead the trial court to the opinion that they are willing to waive their right to submission to a jury, and no matter how carefully the trial court weighs the evidence and decides the case, that the disgruntled party may retract his position and take his chance with a jury.

On the merits of the case we also insist that Your Honors have incorrectly decided the case and have used language and reasoning which is counter to well founded principles of law of contract and which may throw into utter confusion the entire merchandising of canned fruits. It is pointed out in the opinion that there are six recognized grades of canned pears. Three are standard or above; three, substandard or below. In the course of the opinion Your Honors say that the specifications of substandard are meager and inherently uncertain. "The fruit is to be tolerably uniform in size and tolerably free from blemishes. 'Tolerably' has no technical signification, and colloquially its meaning is highly indefinite." In the first portion of the opinion you say, "As throwing some light upon one of the questions in issue it is to be noted that in respect to the three higher grades there is a requirement as to color and symmetry; and, further, that the fruit be ripe yet not mushy; the halves in the Fancy grade, free from blemishes, uniform in size, and very symmetrical; in the Choice, free from blemishes, uniform in size, and symmetrical; and in the Standard, reasonably free from blemishes, reasonably uniform in size, and reasonably symmetrical."

Now, we submit that "tolerably uniform in size and tolerably free from blemish" is surely as definite

and certain as "reasonably free from blemish and reasonably uniform in size and reasonably symmetrical."

Of course pears have other characteristics besides uniformity of size and freedom from blemish, as Your Honors say in your opinion. The color may have been poor, the fruit may have been overripe or not ripe enough, the halves may have wanted symmetry. The definition of substandard leaves these qualities entirely out of consideration. Therefore, a buyer and seller have no right to insist on the pears meeting any particular requirement as to these points. However, the pie fruit, even if put up in the proper percentage of sugar mixture, obviously would not be substandard, nor would water pears. Every witness in the case recognized that substandard pears was a definite grade of pears. The court seems to have entirely lost the significance of the testimony of witnesses for the defendants in error. They all testified, not that the fruit was not attractive substandard fruit, but that the fruit was not substandard. In other words, it was not tolerably uniform in size and was not tolerably free from blemish.

It is true that Judge Bourquin in rendering his decision on the motion for directed verdict did suggest that the buyer could reject if he honestly disapproved the pears, "even as it might be to his sense

of taste," but later he put the issue squarely on the good faith of the buyer in determining whether the goods met the standard. In other words the issue was not, did this buyer like the substandard pears that were offered, but did the buyer in good faith reject the pears because they were not substandard but a lower quality.

Your Honors have assumed that the seller submitted substandard pears and that the buyer still had a right to say he was honestly not satisfied with their quality. This was not the position of Judge Bourquin or the defendant in error. Our position was that the plaintiff in error submitted a canned pear which was not a substandard and so long as the buyer in good faith was not satisfied that it met the requirements of the substandards that the plaintiff in error had not performed its contract.

Your Honors say that, "If, as contended by plaintiffs, substandard is a grade of fruit of certain and uniform quality and characteristics, there was no need for the approval clause." The reason for the approval clause seems to us to be this: If the defendants in error had contracted to purchase cases of salt herring subject to approval of sample, it was entitled to have samples submitted to it to determine whether the herring to be tendered in performance

of the contract were salt herring. If the plaintiff in error had submitted samples of smoked herring, obviously both buyer and seller were interested in having that matter determined by examination of sample rather than have the bulk of the goods shipped to the buyer and then rejected as not being the goods ordered.

While it seemed to the defendants in error and to the trial court that the cases cited by the defendants in error would entitle it to reject goods if in their honest opinion they were not of the grade ordered, the testimony of the defendants in error goes still farther and the defendants in error clearly are entitled to have the court decide whether the submission of an entirely different article than substandard pear would be a compliance with the contract. Do Your Honors intend to say when a party solemnly undertakes to submit samples for approval of substandard pears, that he has complied with his obligation if he submits samples of pie fruit or water pear? Are Your Honors willing to say that the term "substandard pear," although every witness in the case testifies that it has well-known characteristics, is such an indefinite article that the submission of any pear in a can will meet the requirements of such contract? To say this Your Honors must ignore the contract entered into by the parties. It says:

"Any dispute arising as to the proper fulfillment of this contract, to be settled by arbitration. * * * If question is as to quality, actual samples to be drawn and submitted to such board as selected, their decision to be binding upon both parties to this contract." (Tr. p. 7.)

The parties signing the contract therefore specifically agreed that a question may arise as to the proper interpretation of the grade substandard. The instrument is repeatedly referred to as a contract, not as an option. If, as Your Honors suggest, the phrase "subject to approval of sample" is a condition precedent, then the clause just quoted is meaningless for there can be no survival of warranty where goods are sold and accepted subject to inspection. *Stebbins-Walker vs. Hurley-Mason Company*, 79 Wash. 366, 140 Pac. 381.

We suggest for your consideration the proper interpretation of the contract is that if the Everett Fruit Products Company submitted samples to the defendants in error of what it claimed to be substandard pears and the defendants in error refused to accept the pears that the plaintiff in error could have called upon the purchaser to submit samples to an arbitration board and have it determined whether the quality conformed to the well defined substandards that had been established in the trade. It is our posi-

tion that purchaser, had the market been falling, could have no more rejected samples if they fairly met substandard grade, than could the seller avoid his contract by submitting to the buyer pie fruit instead of substandard pears.

As we understand it, the effect of this decision is that when A sells to B and B buys from A certain goods subject to approval of sample, such contract means nothing. It does not require A to tender any goods nor B to look at them if tendered. We are of opinion that in such contract there must be an implied condition that such approval or disapproval shall be exercised in good faith, and that the seller is bound to tender a fair sample, that the buyer is bound to accept the goods if he ought to receive them and that he can not in bad faith reject them. The suggestions in your opinion about qualities which might induce the buyer, perhaps honestly, in rejecting fruit, might perhaps be proper considerations for the court in deciding the fact whether good faith or bad faith was exercised by a buyer or seller, but should not in any way affect the rule of law applicable to such case. These matters, just as the rise or fall of the market, may be weighed by court or jury in determining whether a party acts fairly and in good faith or whether he acts in bad faith.

A contract subject to approval of sample of fancy pears should be interpreted no differently than contract for the sale on the same terms of substandard pears. As to the former, there may be less danger of dispute as to whether the party has acted in good faith because quality of that grade is more definitely determined, but, as we have heretofore pointed out, every witness in the case testified that the qualities of substandard pears are well known in the trade. It is not the lowest quality of pear by two grades. The term "approval of sample" in a contract for sale of fancy pears should be construed so that a buyer and a seller are entitled to determine from the samples and not from inspection of the bulk whether the bulk is of the grade contracted for.

The defendants in error's complaint was framed on the theory and its testimony submitted on the theory that there was a binding obligation on the part of the plaintiff in error to submit samples of substandard pears; that a substandard pear was a well defined trade name for canned pear possessing definite qualities; that the plaintiff in error submitted samples of canned pears which were not substandard pears. The testimony fully substantiates every allegation and every phase of this theory. Even Your Honors' opinion seems to indicate that there is an obligation on the plaintiff in error to submit samples.

If that is true, the contract can not lack mutuality. It would only cease to become a contract when the defendant rejected the samples, but the telegrams offered in evidence and the testimony of the case show clearly that the defendants in error did not absolutely reject the samples but demanded that samples be submitted. (Tr. p. 55.) Before the plaintiff in error was entitled to be relieved on this theory of law it should have proved that samples of substandard pears were in fact submitted.

We trust that Your Honors will give the petition careful consideration and find your way clear to affirm the decision of the trial court, but in event you feel that this is impossible, we suggest that the case be returned to the lower court with instructions to follow the issues made by the pleadings and retry the cause to a jury as to whether or not there has been a submission of samples of substandard pears, what the qualities of substandard pears are, and the measure of damage in event the jury determines that the plaintiff in error has not performed its contract.

Respectfully submitted,

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United States
Circuit Court of Appeals
For the Ninth Circuit.

8

DAVE NIELSON, CHARLES NIELSON, and
JAMES E. REESE,
Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Western District of Washington,
Southern Division.

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F MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

DAVE NIELSON, CHARLES NIELSON, and
JAMES E. REESE,

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of the Western District of Washington,
Southern Division.

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United States District Court, Western District of
Washington, Southern Division,

February Term, 1926.

No. 5436.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVE NIELSEN, CHARLES NIELSEN,
JAMES E. REECE and NOLAND NEL-
SON,

Defendants.

*Page-number appearing at the foot of page of original certified
Transcript of Record.

INDICTMENT.

Vio. Section 37 P. C. (National Prohibition Act and Revenue Acts).

United States of America,
Western District of Washington,
Southern Division,—ss.

The grand jurors of the United States of America, being duly selected, impaneled, sworn and charged to inquire within and for the Southern Division of the Western District of Washington, upon their oaths present:

COUNT I.

That DAVE NIELSEN, CHARLES NIELSEN, JAMES E. REECE and NOLAND NELSON, and each of them, on or about the eighth day of May, in the year of our Lord, one thousand nine hundred twenty-six, or upon a day within two years prior thereto, to the grand jurors unknown, within the Southern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully, unlawfully and feloniously combine, conspire, confederate and agree together, and one with the other, and with divers persons to the grand jurors unknown, to commit certain offenses against the United States; that is to say, to violate the provisions of the Act of Congress passed October 28th 1919, and known as the National Prohibition Art, and of certain statutes in aid of the revenues of the

United States, it being then and there the plan, purpose and object of said conspiracy and the object of said persons so conspiring together as aforesaid, and hereinafter referred to as the conspirators, knowingly, wilfully and unlawfully to manufacture and possess, in said Division and District, certain intoxicating liquors, to wit, distilled [2] spirits called moonshine whiskey containing more than one-half of one per centum of alcohol by volume, and fit for use for beverage purposes.

That said conspiracy was and is a continuing conspiracy, continuing from May 8th, 1926, or a prior day to the grand jurors unknown, and up to the time of the presentment of this indictment.

OVERT ACTS.

1. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators, or one or more of them, at a place near the Nisqually River and about two miles east of the Rainier National Park, and near the abandoned camp of the Anderson and Hall Lumber Company, and in Lewis County, Washington, in said Division and District, the same not then and there being upon lands authorized or licensed for use as a distillery, did then and there knowingly, wilfully and unlawfully set up and possess a certain three hundred fifty (350) gallon copper still intended and fit for the distillation of alcoholic spirits.

2. That after the formation of said conspiracy

and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators, or one or more of them, at the place described under the averment number one of Overt Acts herein, did unlawfully make and ferment or cause to be made and fermented, about two thousand (2,000) gallons of cornmeal and sugar mash, fit for and by said conspirators intended to be used for the distillation of alcoholic spirits, to wit, moonshine whiskey.

3. That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators, or one or more of them, at the place and by means and use of the still described under averment number one of Overt Acts herein, did unlawfully make, distill and manufacture about seven (7) gallons of alcoholic spirits, to wit, moonshine whiskey, and that none of said conspirators had theretofore given any bond to the United States as required by law of persons engaging in the business of distillers [3] of alcoholic spirits.

4. That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, and on or about May 18th 1926, the said conspirators, or one or more of them, did unlawfully have and possess certain intoxicating liquor and distilled spirits, to wit, about seven (7) gallons of moonshine whiskey at the place described in the averment number one of Overt Acts, upon which distilled spirits the tax due the United States had not been paid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,

United States Attorney.

CARROLL A. GORDON,

Assistant United States Attorney.

[Indorsed]: Presented to the Court by the Foreman of the Grand Jury in open Court in the presence of the Grand Jury, and filed in the U. S. District Court June 5, 1926. [4]

**COPY OF JOURNAL RECORD (COURT
MINUTES).**

At a regular session of the United States District Court for the Western District of Washington held at Tacoma in the Southern Division thereof on the 12th day of June, 1926, the Honorable EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said Court as follows:

[Title of Cause.]

**ARRAIGNMENT OF JAMES E. REECE AND
ORDER FOR TRIAL.**

Now on this 12th day of June, 1926, defendant Reece, with P. L. Pendleton as his attorney, is in

court and is arraigned. Asked as to his true name, he says that his true name is James Clifford Reese whereupon it is ordered that this cause proceed under that name. Defendant enters a plea of Not Guilty and trial of this cause is set for June 22d, 1926, 6th case. [5]

PETITION FOR AN ORDER SUPPRESSING EVIDENCE.

To the Hon. EDWARD E. CUSHMAN, Judge of the Above-entitled Court:

Comes now Noland Nelson and respectfully shows and represents unto your Honor:

That he is one of the defendants above named; that on the 8th day of May, 1926, and for sometime prior thereto he occupied as his home a certain cabin or shack located on or near the Nisqually River near the abandoned camp of the Anderson & Hall Lumber Company, in Lewis County, Washington.

That your petitioner is advised that on the 8th day of May, 1926, Major Mark Y. Croxall, and R. A. Lambert, Federal prohibition officers, and certain other persons unknown to your petitioner, came to the defendant's home and without any warrant or right or authority of law, and in violation of defendant's constitutional rights, proceeded to enter his said home and to search the same.

Your petitioner further alleges that he is advised that the said Federal prohibition officers claim to have found in his said home while making such un-

lawful search a certain bottle said to have contained moonshine whiskey, which said officers seized and carried away.

Your petitioner further represents that thereafter your petitioner, together with the other defendants above named, was indicted by the grand jury empanelled by this Court upon a charge of conspiracy to violate the National Prohibition Act, and your petitioner is advised that upon the trial of said cause, as evidence against this petitioner, the United States District Attorney and said officers propose to produce and will produce such alleged intoxicating liquor and that said officers will be called as witnesses for the purpose of showing this defendant's possession of the same.

WHEREFORE, your petitioner prays that an order may be entered herein suppressing said alleged evidence and that said officers be prohibited from offering such evidence or any evidence gained by them at said time by reason of such unlawful search upon such trial [6] against your petitioner.

NOLAND NELSON,
Petitioner.

By LYLE, HENDERSON & CARNAHAN,
Attorneys for Petitioner.

State of Washington,
County of Pierce,—ss.

Frank M. Carnahan, being first duly sworn on oath, says: That he is of counsel for the petitioner above named and that he makes this verification on

behalf of the petitioner upon his information and belief and for the reason that the petitioner is not at this time in Pierce County, Washington, and affiant is unable to get in immediate communication with him. That he has read the above and foregoing petition, knows the contents thereof, and that he believes the statements therein to be true.

FRANK M. CARNAHAN.

Subscribed and sworn to before me this 18th day of June, 1926.

[Notary Seal] J. L. BENTSON,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Rec'd copy June 18, 1926.

CARROLL A. GORDON,
Asst. U. S. Atty.

[Endorsed]: Filed June 18, 1926. [7]

MOTION FOR BILL OF PARTICULARS OF
DAVE NIELSEN.

Comes now the defendant Dave Nielsen and moves the Court for an order requiring the District Attorney to furnish this defendant a bill of particulars giving a more particular description of the transactions upon which the charges are based and further identification of them for the reason that the indictment is so indefinite that the precise charge against these defendants is not apparent.

RALPH WOODS,
Attorney for Defendant Dave Nielsen.

State of Washington,
County of Pierce,—ss.

Dave Nielsen, being first duly sworn on oath, deposes and says: That he is one of the defendants in the above-entitled action; that the alleged Overt Acts are so indefinite that this defendant does not know the precise charge upon which he is being prosecuted; that he cannot intelligently prepare for trial without the bill of particulars showing the evidence to be produced; that the premises and location on which it is alleged this defendant committed the Overt Acts are not sufficiently described; that this defendant cannot safely go to trial without such statement of facts.

DAVE NIELSEN,

Subscribed and sworn to before me this 22 day of June, 1926.

[Notary Seal] RALPH WOODS,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Service admitted June 22d, 1926.

CARROLL A. GORDON,
Asst. U. S. Atty.

[Endorsed]: Filed June 22, 1926. [8]

MOTION FOR BILL OF PARTICULARS OF
JAMES E. REECE.

Comes now the defendant James E. Reece and moves the Court for an order requiring the District Attorney to furnish this defendant with a bill of particulars giving a more particular description of the transactions upon which the charges are based and a better description of the premises and further identification of the premises for the reason that the indictment is so indefinite that the precise charge against this defendant is not apparent.

SAM A. WRIGHT

Attorney for Defendant, James E. Reece,

Office and Post Office Address:

Suit 629 Burke Bldg., Seattle, Washington.

State of Washington,

County of Pierce,—ss.

James E. Reece, being first duly sworn on oath, deposes and says: That he is one of the defendants in the above-entitled action; that the alleged Overt Acts are so indefinite that this defendant does not know the precise charge upon which he is being prosecuted; that he cannot intelligently prepare for trial without a bill of particulars showing the evidence to be produced; That this defendant cannot safely go to trial without a bill of particulars showing exactly what the prosecution will produce.

JAMES REESE.

Subscribed and sworn to before me this 22d day of June, 1926.

[Notarial Seal] CHAS. L. WESTCOTT,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Service admitted this 22d day of June, 1926.

CARROLL A. GORDON,
Asst. U. S. Atty.

[Endorsed]: Filed June 22, 1926. [9]

**MOTION FOR BILL OF PARTICULARS OF
JAMES E. REECE.**

Comes now the defendant James E. Reece and moves the Court for an order requiring the District Attorney to furnish this defendant a bill of particulars giving a more particular description of the transactions upon which the charges are based and further identification of them for the reason that the indictment is so indefinite that the precise charge against this defendant is not apparent.

SAM A. WRIGHT,
Attorney for Defendant.

Office and Post Office Address:
Suite 628 Perkins Bldg., Tacoma, Washington.

State of Washington,
County of Pierce,—ss.

James E. Reece, being first duly sworn on oath, deposes and says: That he is one of the defendants in the above-entitled action; that the alleged Overt Acts are so indefinite that this defendant does not

know the precise charge upon which he is being prosecuted; that he cannot intelligently prepare for trial without the bill of particulars showing the evidence to be produced; that the premises on which it is alleged this defendant committed the Overt Acts are not sufficiently described; that this defendant cannot safely go to trial without such statement of facts.

JAMES REESE.

Subscribed and sworn to before me this 18th day of June, 1926.

[Notary Seal] SAM A. WRIGHT,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Service admitted June 22d, 1926.

CARROLL A. GORDON,
Asst. U. S. Atty.

[Endorsed]: Filed June 22, 1926. [10]

DEMURRER OF DAVE NIELSEN.

Comes now Dave Nielsen by Ralph Woods, his attorney, and demurs to the indictment filed herein and as grounds of demurrer says:

I.

That said indictment does not state facts sufficient to constitute a crime under the statutes of the United States.

II.

That the indictment does not sufficiently inform

the accused of the nature and cause of accusation against him.

RALPH WOODS,
Attorney for Defendant Dave Nielsen.

[Indorsed]: Receipt of a copy of the within pleading and service acknowledged 6/24/26.

CARROLL A. GORDON,
Asst. U. S. Atty. H.

[Indorsed]: Filed Jun. 24, 1926. [11]

DEMURRER OF CHARLES NIELSEN.

Comes now Charles Nielsen by Ralph Woods, his attorney, and demurs to the indictment filed herein and as grounds of demurrer says:

I.

That said indictment does not state facts sufficient to constitute a crime under the statutes of the United States.

II.

That the indictment does not sufficiently inform the accused of the nature and cause of accusation against him.

RALPH WOODS,
Attorney for Defendant Charles Nielsen.

[Indorsed]: Receipt of a copy of the within pleading and service acknowledged 6/24/26.

CARROLL A. GORDON,
Asst. U. S. Atty. H.

[Indorsed]: Filed Jun. 24, 1926. [12]

COPY OF JOURNAL RECORD (COURT MINUTES).

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division of said District, on the 25th day of June, 1926, the Honorable EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said court, as follows:

[Title of Cause.]

ARRAIGNMENT AND PLEA OF DAVE NIELSEN.

Now on this 25th day of June, 1926, defendant Dave Nielsen is in court and is arraigned. Ralph Woods is his attorney. He says that his name is as given in the indictment and enters a plea of Not Guilty.

[Title of Cause.]

ARRAIGNMENT AND PLEA OF CHARLES NIELSEN.

Now on this 25th day of June, 1926, defendant Charles Nielsen is in Court and is arraigned. He says that his name is as given in the indictment. Ralph Woods is attorney for defendant, who enters a plea of Not Guilty. [13]

ORDER DENYING MOTION FOR BILL OF PARTICULARS OF DAVE NIELSEN.

This matter came on for hearing on the 22d day of June, 1926, on motion of the defendant Dave Nielsen for a bill of particulars and the plaintiff appearing by Carroll A. Gordon, Assistant United States Attorney, the defendant Dave Nielsen appearing by Ralph Woods, his attorney, after argument of counsel—

IT IS HEREBY ORDERED that said motion be, and the same hereby is overruled and denied, to which said defendant excepts and his exception is hereby allowed.

Dated June 25, 1926.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed Jun. 25, 1926. [14]

VERDICT.

We, the jury empanelled in the above-entitled cause, find the defendant Dave Nielsen is Guilty as charged in Count I of the Indictment filed herein; and further find the defendant Charles Nielsen is Guilty as charged in Count I of the Indictment filed herein; and further find the defendant James

Clifford Reese is Guilty as charged in Count I of the Indictment filed herein.

J. T. ESHELMAN,
Foreman.

[Indorsed]: Filed Jun. 30, 1926. [15]

MOTION FOR NEW TRIAL.

Come now the defendants and move the Court to vacate the verdict and grant these defendants a new trial for the following reasons:

I.

Error of law occurring at the time of the trial and excepted to by these defendants.

II.

Accident and surprise which ordinary prudence could not have guarded against.

III.

Insufficiency of the evidence to justify the verdict.

IV.

Failure of witnesses to appear when promised.

V.

Misconduct of the jury.

VI.

Abuse of discretion whereby these defendants were prevented from having a fair trial. [16]

VII.

The Court erred in overruling the defendants'

motion for a directed verdict in favor of the defendants.

VIII.

The Court erred in stating to the jury that the matter of place alleged in the Overt Acts is immaterial.

IX.

The Court erred in permitted evidence of other crimes to go to the jury.

X.

There were many other errors occurring at the time of trial.

RALPH WOODS,

Attorney for Defendants Dave Nielsen and Charles Nielsen,

Office and Postoffice Address:

Suite 628 Perkins Bldg., Tacoma, Washington.

FRANK S. CARROLL,

Attorney for Deft. James Reese,
Room 408 Equitable Bldg., Tacoma, Wn.

Recd. copy Jul. 1, 1926.

CARROLL A. GORDON,

Asst. U. S. Atty.

[Indorsed]: Filed Jul. 1, 1926 [17]

MOTION IN ARREST OF JUDGMENT.

Comes now the defendants Dave Nielsen, Charles Nielsen and James E. Reece and move the Honorable Court for an order arresting and setting aside the judgment in the above-entitled cause and for

a judgment of dismissal notwithstanding the verdict of the jury upon the grounds and for the reasons:

I.

That the verdict of the jury is contrary to the law and the evidence.

II.

That the verdict of the jury was based upon incompetent, irrelevant and illegal evidence presented at the trial and allowed to be introduced over the objection of the defendants herein, to which rulings of the Court the defendants excepted, and which exceptions were allowed by the Court.

III.

That there was no competent evidence submitted to the jury upon which the jury could have based a verdict of guilty.

LLOYD and CROTEAU,
Attorneys for Defendants.

[Endorsed]: Filed July 1, 1926. [18]

COPY OF JOURNAL RECORD.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division of said District on July 6, 1926, the Honorable EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal proceedings of said Court as follows:

[Title of Cause.]

ORDER CONTINUING HEARING UPON MOTION FOR NEW TRIAL AND DENYING MOTION IN ARREST OF JUDGMENT.

Now on this 6th day of July, 1926, IT IS ORDERED that the hearing upon motion for new trial be continued to September 27th, 1926. Upon hearing argument of motion in arrest of judgment, the motion is denied and exception allowed. Passing of sentence is continued to 10 A. M. (July 7, 1926). [19]

COPY OF RECORD FROM JUDGMENT AND SENTENCE JOURNAL.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division of said District, on July 7, 1926, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Judgment and Decree Journal of said court as follows, to wit:

[Title and Cause.]

JUDGMENT AND SENTENCE OF DAVE NIELSEN.

Now on this 7th day of July, 1926, defendant Dave Nielsen is before the Court for sentence and being informed of the indictment returned against him in this cause and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him at this time, he nothing says save as before he hath said. Wherefore, by reason of the law and the premises, it is by the Court CONSIDERED, ORDERED AND ADJUDGED that the defendant is guilty of violation of Section 37, P. C. (National Prohibition Act and Revenue Acts), and that he be sentenced to be imprisoned in the United States Penitentiary at McNeil Island, Washington, for a period of One Year and One Day and to pay a fine of One

Thousand Dollars and that execution therefor after disposition of motion for new trial.

[Title of Cause.]

JUDGMENT AND SENTENCE OF CHARLES NIELSEN.

Now on this 7th day of July, 1926, defendant Charles Nielsen is before the Court for sentence and being informed of the indictment returned against him in this cause and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him at this time, he nothing says save as before he hath said. Wherefore, by reason of the law and the premises, it is by the Court CONSIDERED, ORDERED AND ADJUDGED that the defendant is guilty of violation of Section 37, Penal Code (National Prohibition Act and Revenue Acts), and that he be sentenced to be imprisoned in the Pierce County Jail for a period of Six Months and to pay a *fine* [20] *Five Hundred Dollars* and that execution issue therefor after disposition of motion for new trial.

[Title of Cause.]

JUDGMENT AND SENTENCE OF JAMES CLIFFORD REESE.

Now on this 7th day of July, 1926, defendant James Clifford Reese is before the Court for sentence and being informed of the indictment re-

turned against him in this cause and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him at this time, he nothing says save as before he hath said. Wherefore, by reason of the law and the premises, it is by the Court CONSIDERED, ORDERED AND ADJUDGED that the defendant is guilty of violation of Section 37, Penal Code (National Prohibition Act and Revenue Acts), and that he be sentenced to be imprisoned in the Pierce County Jail for a period of Three Months and to pay a fine of Two Hundred and Fifty Dollars and that execution issue therefor after disposition of motion for new trial. [21]

NOTICE OF LODGMENT OF BILL OF EXCEPTIONS.

THOMAS P. REVELLE, United States District Attorney.

CARROLL A. GORDON, Assistant United States District Attorney, for the Western District of Washington.

PLEASE TAKE NOTICE that the undersigned have this 20th day of July, 1926, lodged in the office of the Clerk of the District Court of the United States, for the Western District of Washington, Southern Division, at Tacoma, in which Court this case is pending, a bill of exceptions to the rulings of the Court in the trial of the above-

entitled cause, the same to be presented to the Honorable Edward E. Cushman, Judge of said court, who tried said cause, at the first available sitting of said Court for approval and settlement, a copy of which proposed bill of exceptions is herewith served upon you.

LLOYD & CROTEAU.

F. S. CARROLL. [22]

[Indorsed]: Received this 20th day of July, 1926,
copy of the within notice.

CARROLL A. GORDON,
Asst. U. S. Atty.

[Indorsed]: Filed Jul. 20, 1926. [23]

STIPULATION EXTENDING TIME TO AND
INCLUDING AUGUST 6, 1926, TO SERVE
AND FILE AMENDMENTS TO BILL OF
EXCEPTIONS.

IT IS HEREBY STIPULATED between the plaintiff and the defendants that the plaintiff may have to and including the 6th day of August, 1926, within which to serve and file such amendments as it may desire to propose to the bill of exceptions proposed by the defendants herein, and that an order extending the said time accordingly may be made and entered by the Court at any time without notice.

Dated at Tacoma, Washington, this 30th day of July, 1926.

THOS. P. REVELLE,
U. S. Atty.

CARROLL A. GORDON,
Asst. U. S. Atty.

LLOYD & CROTEAU,
Attorneys for Defendants.

[Indorsed]: Filed Jul. 30, 1926. [24]

COPY OF JOURNAL RECORD.

At a regular session of the United States District Court for the Western District of Washington held at Tacoma in the Southern Division of said District on the 11th day of October, 1926, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said Court as follows:

[Title of Cause.]

HEARING ON MOTION FOR NEW TRIAL.

On this 11th day of October, 1926, this cause comes on for hearing of motion for new trial argued by F. S. Carroll for James Clifford Reese and Wesley Lloyd for Dave Nielsen and Charles Nielsen. The Court hears the matter and denies the motion and exception is allowed. Commitment herein is stayed. [25]

BILL OF EXCEPTIONS.

Appearances:

CARROLL A. GORDON, Assistant United States District Attorney, for the United States of America.

RALPH WOODS, for the Defendants Dave Nielsen and Charles Nielsen;

SAM A. WRIGHT, for the Defendant James E. Reece.

LYLE, HENDERSON & CARNAHAN, for the Defendant Noland Nelson. [26]

BE IT REMEMBERED: That on the 5th day of June, 1926, an indictment was returned in the above-entitled court charging the defendants Dave Nielsen, Charles Nielsen, James E. Reece and Noland Nelson with having violated Section 37, P. C., an Act of October 28th, 1919, of the Revised Statutes of the United States, in that the said Dave Nielsen, Charles Nielsen, James E. Reece and Noland Nelson, and each of them, on or about the 8th day of May in the year of our Lord, 1926, or upon a day within two years prior thereto, to the grand jurors unknown, within the Southern Division of the Western District of Washington, and within the jurisdiction of this Court, then and there being, did then and there knowingly, wilfully, unlawfully and feloniously combine, conspire, confederate and agree together, and one with the other, and with diverse persons to the grand jurors unknown, to commit certain offenses against

the United States; that is to say, to violate the provisions of the Act of Congress passed October 28th, 1919, and known as the National Prohibition Act, and of certain statutes in aid of the revenues of the United States, it being then and there the plan, purpose and object of said conspiracy and the object of said persons so conspiring together as aforesaid, and hereinafter referred to as the conspirators, knowingly, wilfully and unlawfully to manufacture and possess, in said Division and District, certain intoxicating liquors, to wit: Distilled spirits called moonshine whiskey containing more than one-half of one per centum of alcohol by volume, and fit for use for beverage [27] purposes.

That said conspiracy was and is a continuing conspiracy, continuing from May 8th, 1926, or a prior day to the grand jurors unknown, and up to the time of the presentment of this indictment.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators, or one or more of them, at a place near the Nisqually River and about two miles east of the Rainier National Park, and near the abandoned camp of the Anderson and Hall Lumber Company, and in Lewis County, Washington, in said Division and District, the same not then and there being upon lands authorized or licensed for use as a distillery, did then and there knowingly, wilfully and unlawfully set up and possess a certain three hundred fifty (350) gallon copper still intended and fit for the distillation of alcoholic spirits.

That in order to effect the object of said conspiracy, the said conspirators, or one or more of them, at the place described did unlawfully make and ferment or cause to be made and fermented, about two thousand (2,000) gallons of cornmeal and sugar mash, fit for and by said conspirators intended to be used for the distillation of alcoholic spirits, to wit: Moonshine whiskey.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators, or one or more of them, at the place and by means and use of the still described did unlawfully make, distill and manufacture about seven (7) gallons of alcoholic spirits, to wit: Moonshine whiskey, [28] and that none of said conspirators had theretofore given any bond to the United States as required by law of persons engaging in the business of distillers of alcoholic spirits.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, and on or about May 18th, 1926, the said conspirators, or one or more of them, did unlawfully have and possess certain intoxicating liquor and distilled spirits, to wit: About seven (7) gallons of moonshine whiskey at the place described upon which distilled spirits the tax due the United States had not been paid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Thereupon the defendant Noland Nelson petitioned the Court to suppress said evidence, i. e.: A small quantity of whiskey found in a bottle in a small shack occupied by him as his home; and in his petition alleged that said premises had been searched without warrant and in his absence and without his knowledge, which petition was in the form of an affidavit duly sworn to. Thereupon said matter came on for hearing upon the petition to suppress; and thereupon the petitioner rested upon his affidavit; and the Government, to sustain its claim of validity for said search and seizure, without warrant, introduced as a witness one Mark White Croxall, who, being duly sworn, testified as follows:

That he is and was at all times mentioned a deputy internal revenue collector for the United States Government and a prohibition agent for the United States Government. [29]

That on the 18th day of May, 1926, in company with three deputy sheriffs for Pierce County, without warrant, went to the residence of the defendant Noland Nelson; and that there said deputy sheriffs for Pierce County, acting under the direction of the witness, an officer of the United States Government, searched said premises and there found the evidence sought to be suppressed.

That thereupon the Court made and entered an order denying the petition to suppress, to which order the defendant Noland Nelson excepted, and the exception was allowed.

That thereafter, on the 24th day of June, 1926,

(Testimony of Mark White Croxall.)

defendants Dave Nielson, Charles Nielson and James E. Reece filed their demurrer to the indictment, which demurrer was upon the ground that said indictment failed to state facts sufficient to constitute an offense against the laws of the United States of America. Which demurrer was by the Court on the 25th day of June, 1926, overruled, to which said defendant excepted, and exceptions allowed.

Thereafter on the 25th day of June, 1926, upon the motion of the District Attorney said indictment was nollied and dismissed as to the defendant Noland Nelson.

On the same day, i. e., the 25th day of June, 1926, the defendants Dave Nielson, and Charles Nielsen were arraigned and entered their several pleas of not guilty to the indictment filed against them. The defendant James E. Reece was not arraigned and did not plead to the indictment.

Thereafter on the said 25th day of June, 1926, said cause proceeded to trial before a jury regularly impaneled and sworn to try the case; and the following proceedings were had and done: [30]

TESTIMONY OF MARK WHITE CROXALL, FOR THE GOVERNMENT.

MARK WHITE CROXALL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

My name is Mark White Croxall. On the 18th day of May, 1926, I was prohibition agent and

(Testimony of Mark White Croxall.)

deputy collector of internal revenues stationed at Tacoma.

On that date, in company with Prohibition Agent Richard Lambert and Deputy Sheriffs Theodore Moorebacker, John Bodaglia and Paul Jerrery, I went to an abandoned camp of the Anderson-Hall Lumber Company, about two miles this side of Rainier National Park and to the right of the Mountain Highway, four or five hundred yards off the highway. The camp consists of a number of abandoned shacks that have been used for a lumber camp, a garage and a barn. In the garage were two automobiles and in the barn another. There were fresh tracks leading north from the barn and garage down to the river bank, across the fork of the Nisqually River on a log, and came to the main part of the stream. I followed the tracks upstream for about fifty yards in the sand and started into the brush. When we got to the brush there was a well-defined trail. When I came to the bank of Big Creek about three or four hundred yards up the trail I saw some smoke in the woods, and when I was about fifty yards from this smoke I heard someone yell, "Look out!" Three or four men ran from where the smoke was. I took after two of them, but was unable to apprehend them. I fired two shots, one into the ground and one into the air, and called to them to stop and told them who I was. I spent about half an hour trying to locate these men in the woods. I came back to where the smoke was and there I found Deputy Sheriff Paul

(Testimony of Mark White Croxall.)

Jerrery and John Bodaglia. There we found a [31] 350-gallon still, two approximately 1,000-gallon mash tanks, three 52-gallon barrels, two kegs, 5-gallon kegs, one containing about two gallons of whiskey and the other about four or five gallons. One of the tanks contained mash which was composed of sugar and a finely granulated cornmeal and was in a high state of fermentation. The still was not in operation, but there was a fire under it and it was full of hot water. The other tank was full within eight or ten inches of the top and the water in the tank was warm. Right on top of the water was some white granulated cornmeal floating. At the side of these tanks were four 100 pound sacks or 98 pound sacks of granulated sea island sugar. Also two or three coils which were used to superheat whiskey. They are used for the purpose of ageing whiskey. There was also a brindle pit bull dog at the still.

The entire plant was destroyed by burning it. A sample of the sugar was taken.

I then returned over the trail and went to the garage and examined closely the tracks that led from the garage down to the trail.

One of the automobiles in the garage bore license No. 111205. The car I had seen was a Buick touring car belonging to the defendant Dave Nielsen. The back seat of the car was out. There was a rug in the back of the car that had a fringe on the edge of it. This fringe was covered with gunny sack lint. The other car was a new Ford touring car

(Testimony of Mark White Croxall.)

with a temporary license No. 5693, Pierce County. In the bottom of this car was a little finely granulated cornmeal of similar kind and texture as that which was found in the mash tank at the still. The back seat of this car was also missing. [32]

In the barn I found a Chevrolet roadster license No. 111206, belonging to Charles Nielsen. In the left-hand pocket of the driver's seat of this car was a 45 Smith & Wesson revolver, loaded. Under the seat was an empty sea island sugar sack. In the back of this Chevrolet roadster was more of this fine white cornmeal, granulated. In the barn beside the car was the imprint of two 5 gallon kegs, i. e., the imprint compared favorably in size with the bottom of a 5 gallon keg. They were similar.

By the side of the car in the barn was an old mattress and under the mattress were ten or twelve sea island sugar sacks empty. There was no dust on the mattress and no accumulation of cobwebs.

We then went back to the shacks. The first shack as you enter the camp, on the right side, immediately in the rear of that, Deputy Sheriff Murbacher came out with a sack of copper clippings from the wood. Under the back porch, which had the planks out, were two one-gallon glass jugs, which were wet with moonshine whiskey. We entered the shack, which was not locked, and found a driver's license and operator's license for the automobile listed to James Reece.

There were also cooking utensils, food, a bed, some shoes, some fishing tackle; and there was a

(Testimony of Mark White Croxall.)

fish basket there that was filled with No. 10 corks—the same size they use in 5-gallon kegs. In this shack was also some of this sea island sugar, just a small amount among the groceries. Sea island sugar is crystallized cane sugar that resembles rock candy very much.

(Whereupon witness was shown a sack and its contents consisting of sea island sugar, which was admitted in evidence and marked Government's Exhibit No. 1.) [33]

Witness further testified that Exhibit No. 1 was taken from the still described in his testimony.

(Thereupon the Government offered in evidence Government's Exhibit No. 2, being a gunny-sack of copper clippings, which was admitted.)

WITNESS.—(Continuing.) These are the copper clippings from sheet copper that we found 75 or 100 feet in the brush immediately in the rear of the Reece cabin. They were found by Deputy Sheriff Morbacher, and were shown to me in the woods. The texture and weight of this copper is similar to that from which the still was made. My attention being called to the circular collar made of copper, I would say that the piece that was cut from that was a part of the dome of the still. They were about the same diameter at that. I couldn't say anything about the rest of it.

While we were there and had been in the cabin a few minutes, the brindle pit bulldog that we saw at the still came into the cabin. He entered the door and went in and laid down under the table. I

(Testimony of Mark White Croxall.)

called the dog up to me and felt him all over and he was wet as though he had been in the water. He was wet all over. This is the same dog that I had seen at the still.

We then entered the second cabin on the right. The back door was open in that cabin. In that cabin was a bed, a gasoline stove, some groceries. On the bed Mr. Lambert—I think it was—found a part of a pint bottle of whiskey. He called me over and called my attention to it and a quart bottle that had whiskey in it. It had just a little in the bottom of it.

The back seat of the Ford touring car was also in this cabin. That is, it was the back seat of a Ford touring car. [34]

Calling my attention to Government's Exhibit No. 3 for identification, that is part of a pint of liquor that was found in the cabin. It has the same flavor and the same taste as that found at the still. The flavor is distinctive. I recognize the flavor and taste of the whiskey found at the still and that in this bottle marked Government's Exhibit No. 3 for identification, as having been tasted by me before. It has a peculiar flavor. I do not know how I would describe it any more than I know the difference in flavors of anything I taste. I had tasted it twice before near the Oscar Nielsen place.

Mr. WOODS.—I object to that and move to strike the answer. Oscar Nielsen is not a defendant in this action.

(Testimony of Mark White Croxall.)

The COURT.—The objection will be sustained and the motion to strike granted. The jury is instructed to disregard the answer of the witness.

Mr. GORDON.—May I interrogate further along the same lines?

The COURT.—Yes.

Q. Who is Oscar Nielsen?

Mr. WOODS.—We object to that.

The COURT.—Overruled.

Mr. WOODS.—Exception.

The COURT.—Allowed.

A. Oscar Nielsen is the brother of Dave Nielsen.

WITNESS.—(Continuing.) The Oscar Nielsen place is to the right of the Weyerhaeuser schoolhouse out on the mountain road, probably half a mile away, and about fifteen miles south of Tacoma. I do not know whether Dave was living at the Oscar Nielsen place at the time or not. I know that I [35] arrested him there.

Mr. WOODS.—I object to that. Do you mean to say you arrested him there on this charge involved in this case?

A. Not in this case. Not in this case, no.

The COURT.—Objection overruled. Was it before this case?

A. Yes.

The COURT.—Objection overruled.

Mr. WOODS.—Exception.

WITNESS.—(Continuing.) I could not give you the exact date. It was on my case report. I could not give the exact date.

Mr. WRIGHT.—The defendant Reece objects to that evidence as being entirely too remote, and in no way connecting him with it.

The COURT.—Objection will be overruled. The jury will understand this is a conspiracy case; and one of the essential elements of this prosecution is to show by the evidence beyond a reasonable doubt that these defendants were acting in concert and by agreement to break the law in the way it is described in the indictment. Now, whether they were acting in concert or not in this particular transaction is going to be shown by circumstantial evidence. There is no way for the Court to determine in advance whether all of these circumstances are going to bear on that question or not. The indictment alleges that these defendants not only conspired together among themselves, but with other persons to the grand jurors unknown. I will overrule the objection.

Mr. WRIGHT.—Exception.

The COURT.—Allowed.

Mr. WOODS.—We also except to the ruling of the Court, [36] and we move to strike the testimony for the reason that it is an attempt to show that two years ago he drank some whiskey, and that now he has some that tastes the same.

The COURT.—I will sustain that objection. He said he drank some whiskey that tasted like this near Oscar Nielsen's cabin. For all the Court knows, he took it there himself. I don't know how it got there. There is no evidence regarding that. So I

(Testimony of Mark White Croxall.)
sustain the objection to that testimony, and I will instruct the jury to disregard it.

Q. At that time you have spoken of, when you drank some whiskey that tasted like this near Oscar Nielsen's cabin, where did you find that whiskey?

Mr. WOODS.—I thought your Honor sustained that objection that we made to that testimony?

The COURT.—No. The question was did he drink some whiskey that tasted like that near Oscar Nielsen's cabin, and that is as far as his answer went. He did not say where he tasted it, nor where it came from, or anything of that kind.

A. Some whiskey was found in the barn on Oscar Nielsen's place. The same party found it at the still where Dave Nielsen was.

Q. Did you find Dave Nielsen at that still?

A. Yes.

Mr. WOOD.—We object to that for the further reason that there is no contention of an overt act at that time. The only contention as to an overt act is these set forth in the complaint here made.

The COURT.—You are not confined to overt acts to show the arrest of the defendant Dave Nielsen. Objection overruled. [37]

Mr. WOODS.—Exception.

Q. What was Dave Nielsen doing apparently at the still at that time two years ago?

A. He was running the still.

Q. Was he afterwards charged with that offense in this Court? A. He was.

Q. What was his plea, if any, to that charge?

(Testimony of Mark White Croxall.)

A. Plea of guilty.

Mr. WOODS.—We object to that, and move to strike the answer.

Mr. GORDON.—This is merely for the purpose of showing that the whiskey that Dave Nielsen admitted two years ago having manufactured was identical in kind, taste and odor, with this whiskey that was found in this still on May 18th, 1926, at the place alleged in the indictment.

The COURT.—Objection overruled. The jury will understand that you cannot convict a man of one crime when he is being tried for another crime. All this evidence is going in for and is allowed to go in for is to show, if the prosecution can show it, that this was whiskey of a peculiar sort and origin, as being one of the circumstances in the case; that this liquor is similar to liquor which had theretofore been manufactured by the defendant Dave Nielsen.

Mr. WOODS.—We note an exception.

The COURT.—Exception allowed.

Mr. WOODS.—We also object to the statement of counsel that defendant Dave Nielsen was convicted two years ago on a similar charge.

Mr. WRIGHT.—May it be understood that the objection of defendant James Reece goes to this evidence as being too [38] remote; and may we have an exception to the ruling?

The COURT.—Exception allowed. The jury will bear in mind that as far as the defendant Reece is concerned, you cannot consider anything

(Testimony of Mark White Croxall.)

that touches the defendant Nielsen alone until the time that the Government shows that as far as defendant Reece is concerned, until the Government shows that Nielsen and Reece were acting in concert in the manner described in the indictment.

Mr. WOODS.—Our objection goes also to the defendant Charles Nielsen.

The COURT.—Yes. The jury will understand that defendant Charles Nielsen is in the same position as the defendant Reece. Exceptions will be allowed and noted.

Q. (Mr. GORDON.) Now, will you state, Major, as to the whiskey that you tasted at the time of the arrest of Dave Nielsen in 1924, if it was in 1924, on the previous occasion upon the Oscar Nielsen place, when Dave Nielsen was so operating that still, whether that compared in the respects I have described with this liquor which was found in this cabin and is in evidence here as Government's Exhibit 3?

A. It had the same flavor.

WITNESS.—(Continuing.) In the second cabin, which was about 25 or 30 feet from the next cabin where the other things and the license plates were, there was a considerable amount of mail addressed to Noland Nielsen. He is one of the defendants in this case.

There were tracks leading from the cabin to the river that had a peculiar twist in them like they were made by a person carrying additional weight on one side of the body. I have had a great deal

(Testimony of Mark White Croxall.)
of training in observing footprints under [39]
different conditions.

I do not think that in a direct line it would be over 600 yards from the still to the cabin. I could not see the faces of any of the men who ran away, but they were both large men, similar in size to the defendants Nielsen.

Cross-examination.

(By Mr. WOODS.)

I couldn't say whether the map you show me is a fair representation of the Rainier National Forest or not. I think it is about six miles from Ashford to the Park.

(Whereupon, at the request of Mr. Woods, witness drew a map, marked Defendants' Exhibit No. "A-2," which was admitted in evidence.)

WITNESS.—(Continuing.) There are many cars travelling back and forth on the highway. I know there are a large number. I have seen many machines along in that neighborhood. There are a number of houses and cabins occupied by various people in that neighborhood. I think there have been a number of arrests made there for violations of the prohibition law. I do not know how many.

It was about five or six hundred yards from the highway into the camp, and about six hundred yards from the bank of the Nisqually River from the still, the way we had to go. The trail twists around. There are trails all over the woods up in that country heading off from the old logging

(Testimony of Mark White Croxall.)

camp; some run up the river and some run down the river and some of them run diagonally across.

I have marked on the map an "S," which is approximately where the still was located. This is on Defendants' Exhibit No. 1.

Assuming that the map is correct, the still would be about two miles southwest of the park. [40]

I have heard of other arrests being made up in that locality.

There are ten or twelve buildings in this old logging camp. I was there probably three weeks or a month before the 18th of May with Morbacher, Casper and Bodaylea. None of the defendants were there at that time. There was a fellow there named White. I made a complaint against Noland Nelson in this case. Later on this case was dismissed against him by the District Attorney. I was consulted at the time.

I got within twenty-five or thirty yards of the still when I heard somebody say "Look out!" Two large men ran to the left. I never saw their faces. I heard a noise like somebody running to the right, so I took after the two fellows. I fired two shots one into the ground and one into the air. I ordered them to halt. I spent about half an hour trying to find them. Then I came back to the still and found Deputy Sheriffs Jeffreys and Bodaylea. The two fellows went to the left up the trail and into the brush up Big Creek about 50 or 75 yards away.

At the still there were two vats. We burned

(Testimony of Mark White Croxall.)

everything there. That is a wooded country. The men who ran up the stream appeared to wear working clothes.

We left Tacoma that morning about eight or eight-thirty and made two or three investigations on the way down and got back in the evening.

We entered Nelson's house.

Q. Did you have a warrant for that?

Mr. GORDON.—Objected to as immaterial.

The COURT.—Objection sustained.

Mr. WOODS.—Exception. [41]

WITNESS.—(Continuing.) The bottle of whiskey was found in Nelson's cabin on the bed.

Cross-examination.

(By Mr. WRIGHT.)

These two men who were pursued by me ran up Big Creek. I think Big Creek runs into the Nisqually River below that point. I imagine that would be in the general direction of the Park. I did not see the other man, and I can give no information as to what he looked like. I tried to track the men who ran upstream, but I lost their tracks.

The cabin I have referred to is the Reece cabin and is the cabin in which I found the driver's license issued to James Reece. I never saw Reece there on any occasion.

The back seat of the Ford I found in the Nelson, not in the Reece cabin.

(Testimony of Mark White Croxall.)

Redirect Examination.

(By Mr. GORDON.)

I could not say, I would not say that there was any similarity between the still we found when we arrested Dave Nielsen two years ago and the still we found on this occasion. The lint I found on the carpet on the car was burlap lint. [42]

**TESTIMONY OF NOLAND A. NELSON, FOR
THE GOVERNMENT.**

NOLAND NELSON, a witness on behalf of the Government, being first duly sworn, testified as follows:

My name is Noland A. Nelson. I live above Ashford. I live in the second house to the right going in at the Anderson-Hall logging camp. It is one of the buildings constituting the old camp. I started living there about the middle of April, 1926, with Mr. White. I was one of the defendants to this case until the case was dismissed as to me this morning. Until the 7th of April and up to the 2d of May I was driving truck for the Government at White River Entrance, about 104 miles from Ashford. From the time I went to live there in April up to the 2d of May, I was at the Anderson-Hall Camp every night. After the 2d of May, I was more than 100 miles away and did not return until the 22d of May. I found that in my absence other persons had been using my cabin, and on the 22d of May the shack had been tore up. The bed was tore up and my belongings were lying

(Testimony of Noland A. Nelson.)

all over the floor. Letters, etc., were scattered all over the floor. I didn't miss anything, though.

Prior to the 2d of May, I never saw Dave Nielsen, but I had seen Charlie Nielsen and James Reece twice at the Anderson-Hall Logging Camp. I cannot give the exact dates, but it was between April 17th and May 2d. I do not know what they were doing, and know nothing about it except that I came home one night about ten thirty and left the next morning at four or four-thirty. I seen them that night when I came in. I didn't talk to them. They were standing in the road about fifty feet from my cabin. I do not know how they came there or anything about it. This may have [43] been five to seven in the evening. I did not see them have anything in their possession, and didn't see them cross the river.

Calling my attention to Government's Exhibit No. 3, I will say I never saw it before. I had no liquor in my cabin on the 18th of May, and there was none there when I left on the 2d of May.

Cross-examination.

(By Mr. WOODS.)

Mr. Croxall came to me before this case was dismissed against me, yesterday. He didn't exactly promise me that he would have the case dismissed, but he gave me to understand that it would be dismissed, providing I would testify to what I knew about that place.

There are many trails leading out from this camp. I do not know how many or where they

(Testimony of Noland A. Nelson.)

lead. I do not know how far my cabin is from the Nisqually River. I would say that it is about 500 yards from the Mountain Road.

There are a number of houses at this camp, some of them are in fairly good shape. I would not attempt to give the date that I went there to live.

Redirect Examination.

(By Mr. GORDON.)

No other representing the prosecution suggested to me what my testimony should be, except that I was expected to tell the truth, and I have told all I know about this case. [44]

TESTIMONY OF JOHN G. BODAYLEA, FOR THE GOVERNMENT.

JOHN G. BODAYLEA, a witness called on behalf of the Government, being first duly sworn, testified as follows:

My name is John G. Bodaylea. I am and was during the month of April, 1926, deputy sheriff for Pierce County. On the 18th of May, 1926, I accompanied Major Croxall, Prohibition Agent Lambert, Deputy Sheriff Morbacher and Deputy Sheriff Jeffreys to the Anderson-Hall abandoned logging camp near Ashford, Lewis County.

Mr. Jeffreys is east of the mountains. He left about a week ago. He is out of the city on his vacation. As far as I know he will be back in about another week.

(Testimony of John G. Bodaylea.)

On reaching the camp, Mr. Morbacher, Major Croxall, Lambert, Jeffreys and myself got out. We drove up there that morning from Tacoma. It is about 50 miles. We did not find anything at first. When we arrived at the logging camp, Major Croxall and Mr. Jeffreys started out across the river. I was probably two or three minutes behind, when I got there they were in the possession of a still. It was probably a quarter of a mile from the cabin. I did not pay any attention, but I didn't observe any fresh footprints, excepting those which had been made by the officers ahead of me. I heard two shots fired. On reaching the still I found four sacks of sugar. They bore the print "Sea Island Company, sugar." I made an examination of this sugar. The sugar which you show me marked Government's Exhibit 1 has the same appearance as the sugar I found there. We found two vats of mash, approximately 1,500 gallons. One of them, I would say, was ready to run. This particular sugar which I found had not been used in the mash, but the sacks were open. I could not tell what kind of [45] sugar was in the vat. There was also a sack of meal there. I would say that the mash was sufficiently fermented so that it contained some alcoholic content. I did not test it or taste it, but would say that it was working.

There was a small 5-gallon keg. I tasted the contents and would say that it was whiskey containing more than one-half of one per cent alcohol.

(Testimony of John G. Bodaylea.)

The still and the mash were right across from one another. Not more than ten or fifteen feet apart. They were destroyed.

On return to camp we searched the cabins around there. I was not present when the whiskey was found. I believe Mr. Lambert found it. I observed cooking utensils, clothing and such like, in one of the cabins. In the garage was two cars, and in another garage was another car. There was three cars on the premises. I do not think there was anything on the cars themselves to indicate to whom they belonged.

There were also provisions in the cabins. It looked like some one was living there. There was clothing, eatables, food and fishing rods, and I believe some firearms. There was also a fishing basket containing some new corks about an inch in diameter. The basket was a large sized creel and it was about one-third full of corks.

I saw Mr. Morbacher bring in his sack of copper clippings. It was copper just like the still. Those you show me are the ones Mr. Morbacher had.

Cross-examination.

(By Mr. WOODS.)

We had made arrests up there for the violation of the liquor law several years back. We arrested a man named Murray and another man named Gerber, and searched the roadhouse up there. All of these places would be within seven or [46] eight miles of this place. This old mill is about

(Testimony of John G. Bodaylea.)

two miles, I should say, from the entrance to the Park.

The map you show me, being Defendants' Exhibit No. 1, is a fair representation of the Park in that locality.

(Whereupon the map was admitted in evidence and marked Defendants' Exhibit A-1.)

WITNESS.—(Continuing.) I would say it was a quarter of a mile from this old camp to where the still was found. I do not think it was a mile and one-half. I do not know just how far it would be from there to the Gerber place. The Murray place is up by Ashford and the roadhouse we searched just this side of the Park entrance. I can't recall the name, there are several places up in that country where they make moonshine. There are a number of fishermen who come there to fish. There is a pretty good road in there leading right to that camp from the highway. There is a pretty fair path from the camp down to the river. There are several trails around there. They run in all directions.

I would say that the place where these copper clippings were found is perhaps a mile from where the still was, if the map is correct. There are woods all around there, grass, bushes, and underbrush. I could not say that there was any trail out to the copper or not. There is much traffic going by this locality all the year round. I think fishermen fish all the way from Ashford up to the Park entrance, and there is much camping around in that locality.

(Testimony of John G. Bodaylea.)

Cross-examination.

(By Mr. WRIGHT.)

There is a trail going up from this abandoned logging camp, which follows the north or the left-hand side of the Nisqually River. I do not know whether it continues on down [47] the river or not. I followed it about as far as Elliott Lodge one day. I have had considerable experience with mash, and I would say that this mash was ready to run, or nearly so. I couldn't say exactly how long it had been set. Some mash works faster than others. It usually takes from three to ten days.

The first cabin entered was the first one on the right, then the second and so on following. I was in four of them. I was also in the garage and barn. There was no one present while I was there. I remember seeing seat to an automobile, but I do not remember which one. I think it was in the second cabin, I am not sure. [48]

**TESTIMONY OF THEODORE MORBACHER,
FOR THE GOVERNMENT.**

THEODORE MORBACHER, a witness on behalf of the Government, being first duly sworn, testified as follows:

My name is Theodore Morbacher. I am a deputy sheriff for Pierce County, and was such in the month of May, 1926. I accompanied Major Croxall, Deputy Sheriff Bodaylea and others on the trip to the Anderson-Hall Logging Company Camp. That is in Pierce County, Washington. The Nis-

(Testimony of Theodore Morbacher.)

qually River is the boundary line between Pierce and Lewis counties. At that place, and across the river from where the cabins were would be Lewis County. The camp would be on the Pierce County side or the north side.

When we arrived at the camp we first looked over the property and found there were two automobiles in the garage, a Buick and a new Ford. In the barn there was a Chevrolet roadster. I can't give the license number of the cars. I took them down and looked them up when I came into the office to see who they belonged to. I have not the numbers with me. I have two of them in my mind. The car which was in the barn, the Chevrolet, was No. 111206. The other was a temporary license number. The last two numbers of it were 93. The large Buick was No. 111205. I can't remember the first two numbers of the temporary license. I have seen Dave Nielsen drive the large Buick. The Buick and the Ford had the rear seats out of them, and there was some light-colored corn meal in the bottom of the new Ford. It was quite white, but I did not pay much attention to the Buick and the other one.

Lambert and I stayed at the shack while the others went across the river. I had not been feeling well, so I did not hit the trail. We searched around to see what we could find. [49] We did not find any booze. I had also been in the Nielsen and Reece shack, the first one to the right coming in. The front door was open, but the boys had

(Testimony of Theodore Morbacher.)

been in before me. I looked around in there and then went around to the rear. We found the bag with the copper clippings there. At that time they were in the sack that is marked Exhibit 2. It was about 125 feet directly back of the shack in the brush. We also found several empty bottles stuck in the dump. They did not contain any liquor. I found one sack of beer bottles hid away under a log.

Just about then I heard a couple of shots fired. They sounded toward the southwest, toward the river. I came back to the shack about fifteen minutes after these shots were fired. As I got on the porch a dog commenced to bark. He was under the bed. I hadn't seen any dog in there before. The lock was broken on the door and it couldn't be shut but what a dog could easily push it open. He was a kind of a gray brindle dog, and looked as though he had some bull in him. I am not much of a dog fancier, so I do not know what breed he was. The dog was quite wet.

On the wall of this cabin there were Reece's clothes with his driver's license in the pocket. Near the foot of the bed I found some clothes and went through the pockets and found an envelope addressed to Charles Nielsen. It bore a stamp and postmark. There were clothes, boots, shoes, etc. There was corn meal and sugar there, but I paid no attention to it. I do not know whether the sugar was large granules, or small.

I showed the copper clippings to Major Croxall,

(Testimony of Theodore Morbacher.)

and in fact took him back to show them to him before moving them.

I then entered the Nielsen cabin next door. [50]

Cross-examination.

(By Mr. WOODS.)

The dog was a middle-sized dog, about sixteen inches high, I should say. Kind of a brindle dog. I heard the shots very plainly. I did not go to the still. The trail from the garage to the river was a well-defined trail. There were also other trails leading from the barn. This camp is about one-half to three-quarters of a mile off the highway.

The first time we went up there this man White was living there. That was a couple of weeks earlier. There is a pretty good road into the camp, not graded.

We have searched Elliott Lodge once near there. Also the Alpine Lodge, and we also searched Twin Maples. I have searched Fisher's several times. Those are all the arrests that I have made there. We had also found a little still at Fisher's. It was a small affair. These places are all in that vicinity. I do not remember in what cabin I saw the rear seat to the automobile.

Cross-examination.

(By Mr. WRIGHT.)

I noticed a little cornmeal in the bottom of the Ford. I think the dog was still there when we left. I never saw any liquor around the place at all.

(Testimony of Theodore Morbacher.)

Redirect Examination.

(By Mr. GORDON.)

The dog ran out of the cabin when I opened the door, and went out and stayed around after that. I didn't see him when I first went to the place. I would say it was fifteen or twenty minutes after I heard the shots, when I first saw the dog. Later I saw the smoke of the burning still very distinctly. It was long before that that I first saw the dog. [51]

TESTIMONY OF RICHARD A. LAMBERT,
FOR THE GOVERNMENT.

RICHARD A. LAMBERT, a witness on behalf of the Government, being first duly sworn, testified as follows:

My name is Richard A. Lambert. I am a Federal prohibition agent stationed at Tacoma, and was such in May, 1926. I accompanied the other officers to the camp described. Croxall, Morbacher, Bodaylea, Jeffrey and myself were there. The place fronts on the Nisqually River. There are ten or twelve houses and a garage and barn. Four or five of these houses are occupied, if I remember correctly, by different people. Who they are, I do not know.

In the garage were two automobiles. One a Buick and one a Ford. In the back of one was a little cornmeal. In the barn was a Chevrolet roadster. If I remember correctly, there was a little cornmeal in the back of that automobile. Also a little

(Testimony of Richard A. Lambert.)

sugar sack in the back, being used for something
It was marked "Sea Island Sugar."

Two trails lead down toward the river. There were three distinctly well-defined trails that lead from the Anderson-Hall Camp. One of them going directly back to the road. It is an old established place. These trails have been cut down three years ago or more, or whenever they were working in the timber business, but the best trail leads to the river.

Morbacher and I stayed at the camp. I heard the shots fired. I saw the smoke while the still was being destroyed. I stayed at the shacks. We searched the cabins. In the first cabin there was a cooking stove, table, cooking utensils, bedding, clothing and a driver's license issued to Reece. Some fishing outfit, some hooks, lines, poles and a fishing basket. The fishing basket was about one-third full of No. [52] 10 corks. Those corks will fit a five-gallon jug or a five-gallon keg. I believe they were new. I saw some of this Sea Island sugar similar to Government's Exhibit No. 1. Croxall brought back a sack of similar sugar. It looked the same.

I have been a prohibition agent going on three years, and have located about 100 stills. I never saw any sugar similar to this used for the manufacture of mash. I saw a brindle pit bulldog. He was wet when I first saw him.

On the Ford car was temporary license plate No. 5683, the Buick was 111205, and the Chev-

(Testimony of Richard A. Lambert.)

rolet No. 111206. There was a small quantity of white cornmeal in two of the cars. The rear seats had been removed from the Buick and the Ford. The Ford seat was in one of the cabins.

In the second cabin to the right, underneath the pillows, we found a quart bottle with a little bit of liquor in it, maybe a teaspoonful. In a pasteboard box were some personal effects of Noland Nelson. There was also a pint bottle about one-third full of moonshine whiskey. I saw no other liquor in the place. The flask you show me is similar in appearance to the one I found.

Cross-examination.

(By Mr. WOODS.)

I couldn't say who occupied the cabin where the whiskey was found. I couldn't say whether fermentation bleaches cornmeal or not. I saw no sugar in any of the machines. I looked for it, and if there had been any, I think I would have seen it. In the cabin there was some sugar.

The Ford seat was in the middle of one of the cabins, I do not remember which one.

Cross-examination.

(By Mr. WRIGHT.)

The pasteboard box in which I found the whiskey was out in the center of the floor. It was the only whiskey I found, [53] except the quart bottle with a very small amount. The quart bottle was under the pillow.

(Testimony of Richard A. Lambert.)

We entered all of the cabins of the camp, and found nobody in them.

Redirect Examination.

(By Mr. GORDON.)

The Government's Exhibit No. 3 is similar to the flask I found. Government's Exhibit No. 1 is similar to the sugar I found. [54]

TESTIMONY OF CHARLES R. MAYBURY,
FOR THE GOVERNMENT.

CHARLES R. MAYBURY, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows:

My name is Charles R. Maybury. I am Director of Licenses for the State of Washington, and reside at Olympia. I am in charge of the issuance of automobile licenses in this state.

The motor applicant goes to the county auditor and makes his application to him, pays the fee to the county auditor; the county auditor then issues a temporary number to be used until such time as the application can be forwarded to Olympia and the plates shipped from my office. The application is supposed to be signed by the applicant. We receive the original application, the auditor retaining a copy. Temporary license plates bear a serial number of the county. I have here application of Charles Nielsen for a 1926 license for an automobile. The Government's Exhibit No. 4 for identification is a copy certified by myself under

(Testimony of Charles R. Maybury.)

seal of my office of the original application which I have. The original applications are state records and a part of my office. The state's license number was 111206. That was for a Dodge coupe. The address is given as Route 1, Box 180, Eatonville. For David Nielsen the state license is No. 111205, covering a 1924 Buick car. His address is given as Route 1, Graham, Washington. For James Reece the auditor's application card is No. 5683. That is the temporary license that was for a Ford, 1926, touring.

(Whereupon the certified copies of the application were offered in evidence, admitted and marked Government's Exhibits 4, 5 and 6.) [55]

TESTIMONY OF R. L. UHLMAN, FOR THE GOVERNMENT.

R. L. UHLMAN, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows:

My name is R. L. Uhlman. I am deputy county auditor for Pierce County, and have been so for about six years. I have custody of the automobile license application made by James Reece, which was made May 15th, 1926, temporary card was No. 5683. It covers a 1926 Ford touring car, and is signed J. E. Reece. I did not personally witness the signature. The address is given as 3714 South Ainsworth.

(Testimony of R. L. Uhlman.)

Cross-examination.

(By Mr. WRIGHT.)

There is no way of telling from this record what time of the day this license was applied for.

(Whereupon the prosecution was permitted to withdraw the original exhibits and substitute certified copies thereof.) [56]

TESTIMONY OF MARK Y. CROXALL, FOR THE GOVERNMENT (RECALLED).

MARK Y. CROXALL, recalled as a witness on behalf of the prosecution, testified as follows:

I desire at this time to correct my testimony. I said the Ford temporary license was No. 5693. I had my memorandum with me and I made inquiry at the auditor's office at one time. In copying that memorandum I made an error, although my original notes were correct. From my memorandum my official case report was sent in. The original memorandum was correct, but the report was not. Since then the original memorandum has been destroyed. We usually do when we send in the case report.

For the purpose of refreshing my mind before testifying I referred to the case report which reads 5693. Since then I have checked and find that I was in error. [57]

TESTIMONY OF PAUL H. JEFFREY, FOR
THE GOVERNMENT.

PAUL H. JEFFREY, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows:

My name is Paul H. Jeffrey. I am, and was in the month of May, 1926, a deputy sheriff for Pierce County, Washington. I accompanied the other officers who have been named to the Anderson-Hall Logging Camp. I saw the cars parked in the garage and remember the license number of those cars. They were: Chevrolet, 111206; Buick, 111205; Temporary Ford, 5683.

I was absent from Tacoma last Friday while this case was being tried. The back seats of the of two of the cars were missing. There was some white cornmeal scattered on the floor of the Buick and the Ford automobile.

Croxall and I followed the trail across the river and to the still. When we were about 150 feet from the still Croxall hollered "Halt" and fired a couple of shots in the air. I just saw the back of a man go through the brush. I wouldn't attempt to identify him. I heard a voice say "Look out!"

We found a big still and two vats. One had just been emptied and the other was full of mash. There was a complete equipment of a still there, a pump and some kegs, three or four sacks of sugar, white granulated, like the sugar you show me.

(Testimony of Paul H. Jeffrey.)

There was about a thousand gallons of mash there at the still, and considerable white cornmeal scattered around. There was some on top of the vat where whoever had emptied the sacks of cornmeal into the vat,—it had kind of trailed. The vat was made of two-inch planks, and there was considerable [58] cornmeal on top of it. I have been a deputy sheriff since 1921.

I have had occasion to examine the process of fermentation. I would say that yellow cornmeal would not bleach white. The cornmeal I saw in the automobiles resembled the cornmeal I saw at the still. There were two or three ten-gallon kegs, and I believe fifty-gallon barrels. The mash I saw had just been set.

The only liquor there was at the still was what there was at the bottom of the kegs. I do not suppose there was over a pint or so. The still and the mash were destroyed.

I saw a little dog at the still. I saw him again when I returned to the cabin where Morbacher and Lambert were. He stayed around the cabin while we were there. The dog was wet when we came back from the still and found him at the shack.

At the shack there was considerable clothing, a gun, fishing tackle, a fish basket full of corks, three or four gallon jugs, glass jugs which had contained liquor; groceries and eatables; some clothing hanging on the wall; a watch and chain; an Eagle charm in one of the vest pockets, and the charm had the initials on it. The first one was

(Testimony of Paul H. Jeffrey.)

"C" and the last one "N." I am not sure about the middle one. It was an Eagle charm. There was a rifle there also.

There were tracks leading from the cars down to the river bank. We followed them to the still. There was nearly half a sack of sugar at the cabin. Government's Exhibit No. 1 is the same kind of sugar that was in the sack and at the still. It is coarser sugar than ordinary granulated sugar. There were three or four sacks at the still. [59]

In the first cabin the only sign of liquor was the three or four gallon jugs, which had contained it. That is the drainings in the bottom, perhaps a teaspoonful in each jug.

Also in the cabin was a letter, but I do not remember who it was addressed to. Referring to the corks in the basket, it was an ordinary wicker fish basket, probably 14 or 15 inches long, and 8 inches wide, 9 or 10 inches high. It was about two-thirds full of corks of uniform size. New corks. They would fit a gallon jug. I would say there were between 150 and 200.

In the next cabin we found a quart bottle under the pillow in the bed. Lambert found a pint bottle partly full of liquor in a box. Government's Exhibit No. 3 is the same in appearance as the bottle found. This pint bottle was in a pasteboard box that had some clothing and other things in it. This bottle was down at the bottom. The box was about in the center of the room on the floor.

I saw a sack full of copper clippings after we

(Testimony of Paul H. Jeffrey.)

came back from the still. They were similar to Government's Exhibit No. 2.

Cross-examination.

(By Mr. WOODS.)

I didn't see but one trail. I couldn't tell, there may have been others. I was about five or six feet behind Croxall when he shouted. I was probably 150 feet from the man who was running. Probably 125 feet from the still, when Croxall fired. We had not seen the still. Croxall followed them and was gone perhaps twenty minutes. I could not say whether the dog was there when Croxall got there or not.

Cross-examination.

(By Mr. WHITE.)

I think we arrived at camp about ten or eleven in the [60] morning. It is about 50 miles from Tacoma. We left town about eight. I would say that from the camp to the still the way we went was probably three-eighths of a mile. In a straight line it would not have been over 300 yards. I was joined at the still by Boday-lea. There were a couple of axes there and we proceeded to break up the stuff. We had to chop the vats, and that takes time. I would not say that the mash was in a state of fermentation. In my opinion it had been set that morning. The other vat had been run off. I know that yellow cornmeal will not turn white by fermentation.

(Testimony of Paul H. Jeffrey.)

I think we entered four cabins after we went back to the camp. One, I think, belonged to a ranger. He is the man referred to as Mr. White. Then there was the Noland Nelson cabin and then there was the first cabin I spoke of and then there was another one not far from there—I believe we entered five cabins. They all had the appearance of being occupied. I couldn't say whether the cabins were locked or not.

These copper clippings were in the cabin when I saw them. I do not know how they got there.

(Whereupon Exhibits No. 1, 2 and 3 were offered in evidence.)

Whereupon the defendant Reece objected upon the ground that they were too remote, and the defendant Nielsen also objected to the admission of the exhibits. The objection of each was overruled, and exception allowed to each defendant.

(Whereupon the Government rested.) [61]

Whereupon the defendants Nielsens moved the Court for a directed verdict of not guilty in favor of the defendants Dave Nielsen and Charles Nielsen.

Whereupon the defendant Reece moved the Court to strike the testimony of Mark Y. Croxall, and to withdraw it from the consideration of the jury on behalf of the defendant Reece, which testimony related to the arrest and plea of guilty of Dave Nielsen more than two years ago, or about two years ago, for the manufacture and possession of intoxicating liquor.

Thereupon the defendants Nielsen joined in the motion to strike that testimony and remove it from the consideration of the jury.

Thereupon the Court denied the motion for the instructed verdict on behalf of defendants Nielsens, and denied the motion to strike and remove from the consideration of the jury the testimony of the witness Croxall with reference to the arrest and plea in the former case; and refused to further instruct the jury thereon. To all of which rulings by the Court the defendants, and each of them, excepted, and exceptions were by the Court allowed.

Thereupon the defendant Reece moved the Court for a dismissal of the indictment and for a directed verdict on the ground that the indictment did not charge any crime under any statute or law of the United States, and challenged the sufficiency of the evidence to support any verdict of guilty against the defendant Reece upon the indictment; and asked the Court for a directed verdict and a dismissal of the indictment at the hands of the Court.
[62]

Whereupon the Court ruled:

"The motions of both defendants for an instructed verdict denied, and the motion of the last defendant for a dismissal denied."

Whereupon all defendants excepted to the rulings of the Court, and exceptions allowed.

Whereupon the Court instructed the jury as follows:

(Testimony of Charles Nielsen.)

"Gentlemen of the Jury, the Court's ruling is to the effect that the Court holds that the questions in the case are questions of fact for the jury to decide and not questions of law for the Court to decide."

Thereupon, to sustain the issues of the several defendants on their behalf, the defendants and each of them, introduced the following testimony:

TESTIMONY OF CHARLES NIELSEN, FOR DEFENDANTS.

CHARLES NIELSEN, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

My name is Charles Nielsen. I am one of the defendants in this case. I was never arrested. I voluntarily appeared after this case had been on trial a day and one-half and put up bond. My father's name is Pete Nielsen. He is 81 years old. My mother is over 60. Where I live they call it Eatonville, but it is this side of Eatonville about twelve miles. I have been a farmer by occupation all my life.

On the 18th of May, last, I was up at the old cabin, the first cabin on the right-hand side of the road. I was not in any other cabins. My automobile was in an old barn. I had been there twice before this year. [63]

I was up the river fishing. We started for Saw Tooth Lakes, but we could not find them, so we

(Testimony of Charles Nielsen.)

came back and went up the river fishing. My brother Dave, another defendant in this case, was with me. We got back from this old homestead close to twelve o'clock, I judge. I do not know anything about any marks of whiskey kegs in my brother's car. He has no water at his place and he hauls it to the place in milk cans in the same car that he had up there—his Buick. He has been doing that for a matter of three or four months. He sets the milk cans full of water in the back of his car. They make a ring, of course, where the water spills around the bottoms of the cans.

During the months of April and May Dave's wife and family had been sick and were for a time in the hospital. I couldn't say just what the date was when they were in the hospital. On the day we went to the camp Dave had his brother-in-law come out and take care of his place while he was away.

As to there being evidence of cornmeal in the back of my car, all I know about that is that I hauled the groceries for my folks for the past three or four months—groceries and feed. I think that there was a small sack of cornmeal among them. I am not sure whether there was or not. My car is in just the same condition now that it always was.

Cross-examination.

(By Mr. WRIGHT.)

I am acquainted with James Reece. I went up to the mill the day before the 18th, that would be

(Testimony of Charles Nielsen.)

the 17th, in the afternoon. I went in my own car and no one went with me. I went up there to go fishing. I was to meet Reece, who was to take us up to Saw Tooth Lakes. We didn't know the country and didn't know the trail. I had met Reece in Tacoma on Sunday [64] and he told me he was going to cruise a piece of timber for his father and he said maybe he would have time after doing his cruising. I left home about three o'clock. I stayed in the cabin that night. That is the first cabin on the right-hand side as you go in. Reece stayed there with me. Besides our things there were a lot of old clothes and rubbish, some cooking utensils. We didn't disturb anything. We had that camp through the kindness of Mr. White, and we appreciated the fact. So we didn't nose around in anything at all. There were some old shoes, a coat, and some old clothes, as near as I could say.

Reece and I slept in a double bed. My brother Dave Nielsen came in Tuesday morning. He wasn't there on Monday night at all. On Tuesday Reece did not accompany my brother and I. He didn't get done with his job. We left together in the morning around eight o'clock. We didn't see Reece again during the day. I saw him in the evening after we came in, about five-thirty or six o'clock. I got to the cabin shortly before he did. I saw no officers that day and I heard no shots fired.

(Testimony of Charles Nielsen.)

Calling my attention to the dog, I think I have seen that dog around the camp. I had seen it once before around camp. It is a tramp dog. We fed it. At least, we took it to be a tramp dog. It was not my dog and it was not Reece's dog.

Calling my attention to my brother Dave having trouble, I remember that incident well. That was about four years ago, a little over three and one-half years ago.

Mr. WOODS.—We object to that and move that the answer be stricken.

Q. How long ago, if you know, was it this trouble occurred that your brother Dave was in? [65]

Mr. WOOD.—I object to that.

Mr. GORDON.—I object to that.

The COURT.—He has answered that. Objection overruled.

Mr. WOOD.—Note an exception on behalf of the defendants Nielsen.

The COURT.—Allowed.

WITNESS.—(Continuing.) Reece was not charged in connection with that case at all.

Cross-examination.

(By Mr. GORDON.)

I saw no one at the camp on Monday afternoon but Mr. Reece. I didn't see Mr. White there.

The first time we occupied that cabin was the 3d Sunday of April. We came up the night before. Reece and I came up that time for the purpose of going fishing. I do not remember who

(Testimony of Charles Nielsen.)

proposed the trip, but we had been fishing before a number of times this year and the year before.

I have known Reece about three years. I couldn't say how many times I have been fishing with him. I never saw this still and do not recall ever having crossed the river at the point where it was said to be. When we went to the river we went from the cabin and waded up the river about three-quarters of a mile.

We left camp about eight o'clock in the morning. Reece was not with us. I think he left camp after we left. He directed us to the lakes, but we didn't get to the lakes. We went to the river and took a trail to the south, an old skid-road trail. We got up to an old clearing there. There was no trail we could follow, the trail was indistinct, we couldn't find it. It was on the third Sunday of April that Reece and I went fishing up there. Along about the first of May we went fishing [66] again. We drove up early in the morning and came back at night. Stayed the biggest part of the day. I do not know whether I saw Noland Nelson at that time or not. I saw somebody, but it was late in the evening. I rather think it was Noland Nelson, but I didn't speak to him. I do not remember seeing him there on any other occasion. On the first occasion we were there I saw Mr. White. I think that was on the occasion of the first trip. I saw a dog around there on that occasion similar in description to the dog the officers have described. I didn't say that I made friends with the dog, but

(Testimony of Charles Nielsen.)

as a rule I pet a dog and if possible feed him, and think I did so then.

Dave came up the following morning, that is, the 18th.

My name is Nielsen. I occasionally spell it Nelson. I made the application for my automobile license as well as for my brother Dave. I rather think I spelled his name Nielsen and my own Nelson, and I live at Route 1, Box 180.

The car I had up there on the 18th was a Chevrolet roadster bearing license No. 111206. It is not the license issued for the car. My application was for a Dodge Coupe and I received my license for the Dodge coupe. I later placed it on a Chevrolet coupe without the formality of making a transfer for the reason that the license for the Dodge car costs more than the license for the Chevrolet, and I believed I was entirely within my rights in transferring to the cheaper car. There was no idea of concealing the identity of the car.

Redirect Examination.

(By Mr. WOODS.)

Calling my attention to this sack of copper clippings, I know nothing about it and never saw it before. [67]

TESTIMONY OF D. M. WOOD, FOR DEFENDANTS.

D. M. WOOD, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

My name is D. M. Wood. I am no relation to the attorney in this case. I am a chemist by profession and have an office in the Provident Building in Tacoma. I have had no experience in fermenting liquor. Cornmeal, whether fermented or not, will be white even if made from yellow corn if it is put through the refining process. That is, prepared for table use. In that event, the husk is blown away leaving the meal white.

Cross-examination.

(By. Mr. GORDON.)

Neither the boiling nor the fermenting would have any effect on the color, nor would the exposure to the atmosphere. [68]

TESTIMONY OF HARRY FORD, FOR DEFENDANTS.

HARRY FORD, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

My name is Harry Ford. I live at Graham close to the Dave Nielsen place and have lived there a little over a year. I was there in April and May of this year. I know that Dave had no well on his

(Testimony of Harry Ford.)

place and was obliged to haul water for his household use. He hauled it in the back of his automobile in milk cans, which were set on the floor in his automobile. This he had done for a matter of some months.

During the month of April his wife was quite sick. She was in the hospital and later the baby was in the hospital. Dave was doing all of the work, that is, both the farm work and the household work for a matter of a month or two. I could not be sure of the exact date. It was either in April or May they were in the hospital, but I saw Dave practically every day at the farm. He had quite a lot of work to do on the farm—fencing and building a house. He was there practically all of the time. He was around seventy acres in his farm and made the fence posts, himself. I don't believe he had any assistance. He put in the crop, hauled the water, built the fences, took care of the house, and was there practically all of the time.

Cross-examination.

(By Mr. GORDON.)

I do not know the distance from Graham to Ashford. Dave usually hauled the water to his house either from his brother's or from the store. That would be about a quarter of a mile away. I couldn't say just when his baby was in the hospital. I couldn't fix the date. I know for a fact that Dave Nielsen planted his crops, fenced his farm, cleared [69] land around the house and built a house besides doing all of the household work.

TESTIMONY OF S. W. AUSTIN, FOR DEFENDANTS.

S. W. AUSTIN, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

My name is S. W. Austin. I am a merchant. I know the defendant Dave Nielsen and have known him for three and one-half years. I know his place. I have noticed it when I have been going by. I have noticed the amount of work that he has been doing. I have passed his place practically every day. In the early part of the spring, his place was not finished. He started to fence in the spring-time. He did all of the work himself. He made the posts of cedar, cut them, split them—was doing it when I went by his place. He built a house in the spring. I could not say exactly when he completed it. It was a double house, about six rooms. He had one or two men helping him on that.

During the months of April and May he had continual sickness in the family. He had no help in the house and did that work himself. I can't say exactly when his wife was in the hospital, but it was around the first part of May. The baby was born about the first part of April, somewhere around there. Then the baby was sick. I saw it in the hospital. That was at St. Joseph's Hospital in Tacoma.

I make deliveries around the route every day or so. I had occasion to observe these things. Dave

(Testimony of S. W. Austin.)

had no water on his place and was obliged to haul water for the household use. He had been coming up to my place and getting his water a great [70] deal of the time. He hauled it in the back of his Buick car in milk cans. I would say that the bottom of the milk can is similar in size and would make the same kind of a mark as a five-gallon whiskey keg. It would be pretty close to the same diameter.

I saw Dave on the 17th of April. He came to my store. He bought some groceries and some fishing tackle. I have my bills here with me. That was on the 17th of May.

Calling my attention to Defendants' Exhibit A-4 for identification, that is the bill of goods that I sold him on the 17th of May. The first thing on the list is two fish lines.

Q. Did you know about his going fishing?

A. Yes. When he was buying fishing tackle he made the remark that he was going fishing.

Mr. GORDON.—I object to what he said and ask the jury be instructed to disregard it.

The COURT.—Objection sustained. The jury will disregard what was said.

Mr. WOODS.—Exception.

The COURT.—Exception allowed.

(Whereupon the sales slip was received in evidence, marked Defendant's Exhibit No. A-4.)

WITNESS.—(Continuing.) During the time that Dave Nielsen was away on this trip on the 18th

(Testimony of S. W. Austin.)

he got his brother-in-law Duffy to stay with his family.

Cross-examination.

(By Mr. GORDON.)

My store is on the Kapowsin Road, slightly over a mile from Nielsen's place.

I remember Duffy coming up to my store while Dave was [71] away, telling me that he was staying at Dave's. Duffy told me that himself. I didn't see him at the place myself. I see Dave practically every day. I go past his place making deliveries practically every other day. Sometimes it might be three days between times, and sometimes every day. I didn't see him every time I went down there, but practically every time. When I went past there he was usually out working. It would be pretty hard to say how many times I made a delivery, but it was quite a few. Oftener than once a week.

On one occasion I went to town with Dave. That is when I saw the baby in the hospital. I would say that was about the 12th or 14th of May, probably.

I think Dave's farm is seventy acres. I saw him making the cedar posts from logs that he had hauled and split. I saw him splitting them. I didn't see him hauling the logs. He had a boy helping him once when I was there. At least, he appeared to be helping him. I couldn't say for sure. I saw him splitting posts, stretching the barb wire,

(Testimony of S. W. Austin.)

setting the posts, digging the holes, clearing the land, building a house, and the most I ever saw helping him was two men on his house. I couldn't say just how long it took to finish the house. He was working on *on* and off at that probably a month and one-half. Often I would stop and talk with him.

I have seen him haul water in the milk cans many times. From a casual observation only, I would say that the milk cans compare favorably with a five-gallon keg as to the size of the bottom. I never made an exact comparison, but I would say that they are very close.

I am not related to Dave Nielsen nor to any member of his family. [72]

TESTIMONY OF WILLIAM NIELSEN, FOR DEFENDANTS.

WILLIAM NIELSEN, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

My name is William Nielsen. I live at Graham, Route 1, across the road from Dave. I know that Dave has been working on his place all spring. He started to build his house last fall, about December. He had two carpenters helping for a while. Then he was working at it alone. The carpenters were there three or four weeks, but it wasn't completed. He has been working there since himself. The house is now completed all but the papering and some

(Testimony of William Nielsen.)

painting yet to do. He has been doing most of it since himself. He had a boy helping him for a few days. David cut the posts. He got the cedar on the place that he made them from. He was at home during most of the month of April and May. I saw him nearly every day. I live right across the road about four hundred feet from him, and I can see him whenever he is out. I know that he has been home practically every day, except when his wife was in the hospital, when he may have been in Tacoma occasionally. She was sick. She was sick about the first part of April and afterwards too. David was doing the work and he had no one to help him. Then the baby was sick in the hospital.

There is no water on Dave's place. He hauls it most of the time from my place and from the store in milk cans in his car.

In the Nielsen family there are six brothers and two sisters. My father lives up in the neighborhood. He has lived in Pierce County for forty years. Charlie is staying with the old folks making his home there. [73]

Cross-examination.

(By Mr. GORDON.)

The house, as I remember, was started in November and he moved into it in about three weeks, when the carpenters quit. That is, he moved in a few days before Christmas. They had their Christmas dinner there, and a good deal of

(Testimony of William Nielsen.)

the building was done after that, but most of it was done before the first of February. That is, most of the outside. About March he had his fencing to do. He put in the crops in April. I know, because I sowed the oats for him myself. He did the harrowing and I sowed the oats. That would be about the 8th or 10th of April when his crops were all in. From the 10th of April to the middle of May he was leveling up around the place where he has his buildings. It was all rough and he had to make a road into his garage, and gravel it. He was working on that.

The baby was born about the first of May at the hospital. The mother was sick during her confinement and after she got back. She was quite sick. Later the baby was taken to the hospital, but taken back some time before the first of June.

TESTIMONY OF JOHN J. DUFFY, FOR DEFENDANTS.

JOHN J. DUFFY, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

My name is John J. Duffy. I am a brother-in-law of Dave Nielsen. On the 17th day of May I was down at my brother-in-law's and at Dave Nielsen's place. I went over there to visit and he proposed a fishing trip. Me and my wife took care of the family while he was away. Dave's family was [74] sick during the month of April and on until

(Testimony of John J. Duffy.)

after the 18th of May. In fact, they are still sick. I was taking care of them while Dave was away. There was no woman hired around the place. I was not at Dave's place during the month of April at all. I was there on May the 18th. I was around there for a week end after that shortly. I was not there during the month of March.

Mrs. Nielsen is my sister-in-law, and I know about her being sick. I know that of my own knowledge. I live about eight miles from where she lives.

TESTIMONY OF A. B. WHITE, FOR DEFENDANTS.

A. B. WHITE, called as a witness on behalf of the defendants, testified as following, after being duly sworn:

My name is A. B. White. I live about three-quarters of a mile outside of the Park entrance, at the Old Mill. I would say it takes about thirty minutes to walk from Nisqually to Big Creek. It is probably a mile and a quarter by trail or a mile and one-half. Big Creek on the map is about one and one-quarter miles from where this old mill site is. The way you usually approach going through the woods is a large butte about 150 feet high that you hardly ever cross. I live in the office of the old mill and have lived there since December. I have charge of the place. There is only one place occupied at the present time. There are usually quite a number of campers there.

(Testimony of A. B. White.)

I wasn't present after the 12th of May until the 5th of June. I was working for the Government and was not there.

This camp is private property. There are quite a number of trails there, three or four. Some are not used. [75] There are some strangers there every week. Tourists and pleasure seekers. The houses are unfurnished. There are three cabins there at the present time unoccupied that have some dishes in them. The doors are kept unlocked. There is a mattress in the cabin that is described as the one Reece and Nielsen used. A mattress and a wooden home-made bedstead, an old cook-stove, and I think there was a heating stove; and on the stove there was an old teakettle and some frying pans and a few other cooking utensils. I never noticed in particular just what they are. There are not supposed to be groceries there, but there might be, I couldn't state.

Cross-examination.

(By Mr. WRIGHT.)

I am in the Government forest service and live at the place continuously from December until May. I was there when Noland Nelson was living there. I know about the time he came there. I think he was there about three weeks. No one was living with him. I never rented cabins to anyone.

These things I have described in the cabins have been there for several years. The cabin is occupied

(Testimony of Thomas B. Elliott.)

by the different parties that come in there and there have been a number of people, but not a great number, who have occupied them at different times.

TESTIMONY OF THOMAS B. ELLIOTT, FOR DEFENDANTS.

THOMAS B. ELLIOTT, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

My name is Thomas B. Elliott. I live a quarter of a mile this side of the Park entrance on the Mountain Road.

I know the old Northwestern Mill. It is about a mile and a quarter from the Park entrance. There are about seven or [76] eight houses between it and the Park entrance. Nearly all of them are occupied the year around. There are four or five old mills between Ashford and the Park entrance. One of them is the Northwestern Lumber Company. I worked for them. Lots of fishermen go to that place during the months of April and May. Many people around there frequently just walk around and do not go fishing. Frequently people occupy the cabins.

Cross-examination.

(By Mr. GORDON.)

I have lived there for eighteen years and I never knew of an Anderson-Hall Mill. There is no such place. I run a summer resort there and a store just outside of the Park entrance. I think they mean, however, the old shingle-mill. That is the

(Testimony of James Reece.)

Scott & Anderson mill. It is on the bank of the Nisqually River.

TESTIMONY OF JAMES REECE, FOR DEFENDANTS.

JAMES REECE, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

My name is James E. Reece. I am one of the defendants in the case. I am 27 years old and live at 2718 South Ainsworth in the City of Tacoma. I am married and have a family.

I am a compassman and timber cruiser by occupation and have been following that work since 1917. I am acquainted with Charles Nielsen and Dave Nielsen, but not well acquainted with Dave Nielsen personally, and have not been.

My father used to have Reece's camp up on the mountain.

In the middle of May this year I was at the abandoned [77] camp. I went there on the 16th of May. I remember the date because I bought a new car on the 15th of May.

I have here Defendants' Exhibit No. 5 for identification, that is my contract to purchase bearing that date.

After I got the car I bought some groceries to take to my home to my wife. I was going up on a job at this camp where I was to cruise some timber at the Metzler homestead. That is in Section 27

(Testimony of James Reece.)

about one mile west of the Park entrance. The southeast corner of 29 is about a quarter of a mile from the camp northwest. That is where I was going to work. I went up on the evening of the 16th. That was Sunday. I went alone. Charles Nielsen joined me there later. That was pursuant to an arrangement we had made. He wanted me to take him to Saw Tooth Lakes. I told him I was going to look at the timber and if I could get done in one day I would show them the way, but I did not get done; so I directed them. He came up on the next day, which was on Monday. Dave came on Tuesday morning.

On Monday I went over part of the timber and looked at my corners. I stayed in the first shack on the right. I had Mr. White's permission to occupy that camp and I had occupied it once before. That would be about the third week in April. Charles Nielsen was with me. We came in about ten o'clock on Saturday night. I do not know the day of the monty—somewhere between nine and ten o'clock. I went away the next evening. We were fishing while we were there.

To an extent, I know what the contents of the cabin were, but I never investigated. There was a bed, a coat, a couple of old skillets, but not much bedding. There were pots and pans, dishes and tins. We didn't take any cooking [78] utensils with us. They were already there. I took a couple of blankets and a quilt with me. There were some groceries there when I came there. I brought some

(Testimony of James Reece.)

from home with me. Naturally I brought them with me because I expected to be there a couple of days.

In cruising the timber I went away from the river. I spent practically all day cruising the timber. I did not see any officers up there either on Monday or Tuesday. I heard no shots fired.

On Tuesday morning the Nielsen boys left before I did. I left the cabin about eight o'clock. They had left some time before. I never saw Dave at all again. I saw Charlie about six o'clock in the evening. That was when I got back to the cabin. Dave was not there.

I have heard the testimony about where the still was discovered, and I would say that from the cabin that would be about three-quarters of a mile if you went south, but if you went by trail it would be from a mile and one-quarter to a mile and one-third. I do not know anything about this still, which the officers claimed to have found. I knew nothing about it and never saw it.

Calling my attention to Government's Exhibit No. 2, which is a sack of copper clippings, I never saw them before they were brought into court.

I occupied the first cabin to the right on the 15th, 16th and 17th of May. Noland Nelson had the second cabin. I was not in that cabin.

When the officers testified that the seat of my automobile was found in that cabin they are mistaken. I know it was in the first cabin because I took it there myself. [79] There were no chairs in the cabin and I took the seat in to sit on. I

(Testimony of James Reece.)

laid it across a couple of boxes. To an extent, I can tell you what the provisions consisted of. I brought fresh meat, groceries, and a sack of corn-meal mush, and I believe I bought some rice and a loaf of bread. I bought two loaves of bread—one to take with me and one to leave at home. It is quite possible that there was a hole in the sack of cornmeal that I bought, and I threw it on my seat cushion when I went home. I believe I noticed there was some cornmeal there, but I never paid any attention to it. The back part of my car is in the same condition that it was in May.

When I was up there fishing in the middle of May I saw Noland Nelson. It was in the evening of Sunday. I couldn't say just what time. I didn't talk to him. I saw Bob White up around there at that time. I had seen several different people fishing, but I didn't know them and didn't speak to them. I have heard the officers' description of the dog that was there and I have seen the dog there before. In fact, I have seen other dogs. I do not remember whether there was any dog there in the middle of April or not, but there may have been. The dog the officers have referred to was not my dog and was not brought there by either of the Nelson boys. That I know. I have a dog, but my dog is a collie.

It is eighteen miles across the park. It has been about six or seven years since I have been on the east side of the park.

(Testimony of James Reece.)

Calling my attention to the rifle, that was said to be in the cabin, that rifle belonged to me. I have had it for some time, and nearly always take it with me on my cruising [80] trips. I have been in the Noland Nelson cabins, but that was about three years ago. I have never been convicted of any crime.

Calling my attention to Dave Nielsen's arrest and plea some two or three years ago, I was not charged in connection with that and had nothing to do with it.

Mr. WOODS.—I wish to object to that question on behalf of Dave Nielsen, if your Honor please.

The COURT.—Overruled.

Mr. WOODS.—Exception.

The COURT.—Allowed.

WITNESS.—(Continuing.) I know nothing about the details of that transaction.

Cross-examination.

(By Mr. WOODS.)

They do not allow dogs in the park. I have examined the map to see how far it is from the old mill to Big Creek. Maps are my business. That is a Government map and I would say that according to the section lines it would be nearly a mile, by trail it would be close to a mile and one-half.

The Nisqually River is on one line of that section and Big Creek is a little over the line in the next section south. I never took my gun into the park.

(Testimony of James Reece.)

Cross-examination.

(By Mr. GORDON.)

I did not take my gun this morning for any particular purpose at all. I just took it with me as I usually do. Sometimes I take it with me for signal purposes. The gun is not valuable. Any-one who wants it can have it for \$10.00. I wouldn't have any hesitancy in leaving it at the cabin. The cabin is not locked. I had no authority to lock the cabin. I was making this cruise for my father. He is somewhat engaged [81] in the timber business. That was the purpose of that cruise. He wanted this cruise because he wanted the camp site for a summer resort. He wanted to see if the timber was of any value also, and if it was worth what they asked for it. Mrs. Metzler owned the land. This land belonged to the Metzlers before the forest reserve was created. I fed a dog at the camp. That is, I threw him some scraps. I do not recall seeing the brindle bulldog on the 18th. I don't remember, but he may have been there. It has been approximately two years since I have been across the river over on Big Creek.

I bought my car on the 15th, loaded it with groceries and bought provisions for my trip. I went in on Sunday evening and left some groceries at the house, including the cornmeal. I intended to take the meal with me, but I forgot it. I have about half a sack of it at my house now. When I drove my car home I knew there was some corn-

(Testimony of James Reece.)

meal in the back of my car. The sack had leaked when I picked it up.

I believe Charlie Nielsen brought a dozen of eggs. Charles had arranged to go on the fishing trip. He did not say anything about bringing Dave. I told him I had provisions with me. I also brought a small sack of sugar. I didn't know just how long I would be there, one day or two.

Redirect Examination.

(By Mr. WOOD.)

The sugar sack's contents was cane sugar of the granulated sugar.

Calling my attention to Government's Exhibit No. 1, which seems to be a kind of coarse sugar, my sugar did not look anything like that. I made no examination of the other packages in the cabin.
[82]

I never looked through anything outside of what I took. I believe there was also a shotgun in that cabin, which I saw standing in the corner. That was there both times when I was there. I believe there was also a fish basket in the corner, but I never paid any attention to it. I did not know anything about there being any corks in it. I never owned a fish basket and did not take one with me when I went fishing.

TESTIMONY OF THOMAS B. ELLIOTT FOR DEFENDANTS (RECALLED).

THOMAS B. ELLIOTT, recalled as a defense witness, testified as follows:

Calling my attention to the contents of the cabin, that is the first cabin on the right, the cooking utensils and stove belong to me. I have owned them for five or six years. I never took them away. I sometimes direct as many as 15 or 20 people a day from my place down to the old mill site.

I have known the defendant James Reece from 16 to 18 years, and have been very well acquainted with him. I know his reputation in the community in which he resides. I know that his reputation as a law-abiding citizen is good. I know his reputation both in Tacoma and in my community, as I am acquainted in both places.

Cross-examination.

(By Mr. GORDON.)

I am in and out of Tacoma all the time. James Reece lived with me for a good many years, and we have been very closely connected with him. I go to his house. I meet him pretty near every time I come to town, if he is in town. We have many mutual friends. Among those who know him he has a good reputation. I mean by that that it is good among the majority of people who know him.
[83]

Whereupon the defendants rested.

TESTIMONY OF THOMAS B. ELLIOTT, FOR THE GOVERNMENT (RECALLED).

THOMAS B. ELLIOTT, recalled on behalf of the prosecution, testified as follows:

I am acquainted with the geography of that neighborhood. This camp is on the north side of the Nisqually River between this camp and Big Creek. It is on the stream right between the mill and Big Creek. Right straight across south I would say, there is a tributary of the river running through there. I never came across at the point you are asking about, and never walked through there. When I am fishing in there I go up stream and go down at the head of it. Sometimes I fish a quarter of a mile or half a mile down and then go back up, to keep from going through those devil-plugs. I am not familiar with it otherwise. Crossing the river you come first to this tributary and then to Big Creek. The trail would be about a half a mile or more across. The tributary has no name that I know of. Big Creek has not a great deal of water. The Nisqually has quite a lot. This other little stream is just a small seepage stream.

Cross-examination.

(By Mr. WRIGHT.)

You go about a mile to get from one stream to the other. You would have to go south over to Big Creek. The river runs pretty near east and west, not quite. On the left bank of the Nisqually

(Testimony of Mark Y. Croxall.)

there is no trail direct there at all, where you have asked me. [84]

TESTIMONY OF MARK Y. CROXALL, FOR THE GOVERNMENT (IN REBUTTAL).

MARK Y. CROXALL, called as a witness on rebuttal, testified as follows:

I am not familiar with Big Creek. I have been up Big Creek from the other side. I desire to correct my testimony to the effect that the still was on the first stream that we came to. After we crossed the Nisqually River, we didn't cross any stream at all.

Cross-examination.

(By Mr. WRIGHT.)

I usually time the distance by my watch, it took ten minutes by my watch to walk up.

TESTIMONY OF RICHARD A. LAMBERT, FOR THE GOVERNMENT (RECALLED IN REBUTTAL).

RICHARD A. LAMBERT, recalled as a witness, testified as follows:

Morbacher and I were the first to enter the cabin in which the automobile seat was found. It was leaned up against the wall. The provisions in the cabin consisted of about one dozen eggs, two loaves of bread, about three or four pounds of bacon, about a pound of coffee in a can and some butter on the table. [85]

On June 30th, 1926, the jury returned into court its verdict of guilty as charged against all defendants.

On June 30th all defendants filed their motion for a new trial.

On July 1st, all defendants moved the Court for an order in arrest of judgment.

On July 6th, motion for arrest of judgment was denied as to all defendants. To which defendants, and each of them, excepted and exception was allowed.

On July 6th the defendant Dave Nielsen was by the Court sentenced to serve a term in the United States Penitentiary of one year and one day at McNeil's Island; and to pay to the United States a fine of \$1,000.00, and the costs of prosecution.

Defendant Charles Nielsen was sentenced to serve six months in the County Jail for Pierce County; and to pay to the United States a fine of \$500.00, and to pay the costs of prosecution.

James E. Reece was sentenced to serve a term in the County Jail for Pierce County of three months; and to pay to the United States a fine of \$250.00, and to costs of prosecution.

The term was continued by order of the Court as to this case and all proceedings therein. Defendants were allowed until the 20th day of July, 1926, in which to lodge their bill of exceptions.

The hearing on the motion for a new trial was set for the 27th day of September, 1926. [86]

The Court instructing the Jury gave, among others, the following instruction:

Now, the exact date it is charged this conspiracy is entered into is not material in the sense it has to be shown. It is sufficient if the evidence shows it was entered into within the time of the statute of limitations before the return of the indictment.

No instruction was given defining the statute of limitations. [87]

On the 27th day of September, 1926, hearing on the motion for a new trial was continued to the next law day, and thereafter continued from law day to law day until the 11th of October, 1926, at which time argument was heard upon said motion by the Court; and said motion having been by the Court considered, the motion was by the Court denied, to which order the defendants and each of them excepted and exception was by the Court allowed.

On the 15th day of September, 1926, by order of the District Judge the matter of the settlement of the bill of exceptions was continued to the 25th day of September, 1926, at ten o'clock A. M.

On the 11th day of October, 1926, at ten o'clock A. M. the settlement of said bill of exceptions was again continued until Wednesday, the 13th day of October, 1926, at ten o'clock A. M.

[Endorsed]: Filed Oct. 13, 1926. [88]

ORDER SETTLING BILL OF EXCEPTIONS.

Now, on this 13th day of October, 1926, the above cause came on for hearing upon the application of the defendants David Nielson, Charles Nielson and James Reece to settle the bill of exceptions in

this cause; counsel for the Government and defendants being present and agreeing that the same contained the only material facts occurring in the trial of said cause,—

NOW, THEREFORE, IT IS HEREBY ORDERED that the foregoing bill of exceptions be and the same is hereby settled as a true bill of exceptions in said cause, and the same is hereby certified accordingly by the undersigned, Judge of this court who presided at the trial of said cause, as a true and correct bill of exceptions; and the Clerk of this court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Dated this 13th day of October, 1926.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed Oct. 13, 1926. [89]

PETITION FOR WRIT OF ERROR.

To the Honorable EDWARD E. CUSHMAN,
Judge of the United States District Court for
the Western District of Washington:

Come now Dave Nielson, Charles Nielson and James E. Reese, defendants above named and petitioners in error herein, and respectfully show:

I.

That your petitioners are the only defendants proceeded against to final judgment in the above-entitled cause.

II.

That on the 30th day of June, 1926, a jury duly impaneled and sworn to try the case in the above-entitled court, found a verdict of guilty against each of said defendants above named upon the indictment returned herein; and that thereafter on the 6th day of July, 1926, final judgment was made and entered herein whereby it was adjudged that the defendant Dave Nielson be confined in the United States Penitentiary at McNeils Island for the period of one year and one day and to pay to the United States a fine of \$1,000.00 and the costs of prosecution; and that the defendant Charles Nielson be [90] confined in the Pierce County Jail for a period of six months and pay to the United States a fine of \$500.00 and the costs of prosecution; and that the defendant James E. Reese be confined in the Pierce County Jail for the period of three months and pay to the United States a fine of \$250.00 and the costs of prosecution, all of which will more fully appear from said judgment which is hereby referred to and made a part of this petition.

III.

Your petitioners represent that in said judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of the defendants above named and each of them, all of which will more in detail appear from the assignment of errors, which is filed herein.

Your petitioners above named, feeling themselves aggrieved by said verdict and judgment entered thereon as aforesaid, herewith petition this Honor-

able Court for an order allowing them to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court in such cases made and provided.

WHEREFORE, your petitioners pray that a writ of error issue in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit as aforesaid for the correction of errors so complained of; and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

FRANK S. CARROL,
WESLEY LLOYD,
A. J. CROTEAU,

Attorneys for Petitioners in Error. [91]

Service of the foregoing petition and receipt of a copy thereof is hereby admitted this 22d day of November, 1926.

BERTIL E. JOHNSON,
Assistant United States Attorney.

[Indorsed]: Filed Nov. 30, 1926. [92]

ASSIGNMENT OF ERRORS CLAIMED BY
DAVE NIELSON.

Comes now Dave Nielson, one of the above-named defendants, and serves and files the following separate assignment of errors upon which he, as one of the plaintiffs in error, will rely in the prosecution of the writ of error herein to the United States Circuit Court of Appeals for the Ninth Circuit from

the judgment and sentence herein entered and imposed on the 6th day of July, 1926:

I.

The Court erred in denying the petition of Noland Nelson to suppress evidence, i. e.: A small quantity of whiskey found in a shack occupied by said Noland Nelson as his home, which said home was searched without warrant of law. (Pp. 4 and 5, Bill of Exceptions.)

In that connection, the Court further erred in excluding testimony as follows:

MARK Y. CROXALL.—(Cross-examination.) We entered Nelson's house.

Q. Did you have a warrant for that? [93]

Mr. GORDON.—(District Attorney.) Objected to as immaterial.

The COURT.—Objection sustained.

Mr. WOODS.—Exception.

WITNESS.—(Continuing.) The bottle of whiskey was found in Nelson's cabin on the bed. (Said bottle of whiskey referred to being marked Government's Exhibit No. 3.) (Pp. 16 and 17, Bill of Exceptions.)

II.

The Court erred in permitting the witness Mark Y. Croxall to testify as follows:

Mr. CROXALL.—I do not know whether Dave (Nielson) was living at the Oscar Nielson place at the time or not. I know I arrested him there.

Mr. WOODS.—I object to that. Do you

mean to say you arrested him there on this charge involved in this case?

A. Not in this case, no.

The COURT.—Objection overruled. Was it before this case?

A. Yes.

The COURT.—Objection overruled.

Mr. WOODS.—Exception. * * *

Mr. WRIGHT.—The defendant Reese objects to that evidence as being entirely too remote, and in no way connecting him with it.

The COURT.—Objection will be overruled.

* * *

Mr. WRIGHT.—Exception.

The COURT.—Allowed. (Pp. 10 and 11, Bill of Exceptions.)

The Court further erred in permitting the witness Mark Y. Croxall to testify further as follows:

Q. (By the District Attorney.) At the time you have spoken of (referring to an occasion about two or three years ago), when you drank some whiskey that tasted like this near Oscar Nielson's cabin, where did you find the whiskey? [94]

A. Some whiskey was found in the barn on Oscar Nielson's place. The same party found it at the still where Dave Nielson was.

Q. Did you find Dave Nielson at that still?

A. Yes.

Mr. WOODS.—We object to that for the further reason that there is no contention of an overt act at that time. The only contention as

to an overt act is these set forth in the complaint here made.

The COURT.—You are not confined to overt acts to show the arrest of the defendant Dave Nielson. Objection overruled.

Mr. WOODS.—Exception.

Q. What was Dave Nielson doing apparently at the still at that time two years ago?

A. He was running the still.

Q. Was he afterwards charged with that offense in this court?

A. He was.

Q. What was his plea to that charge?

A. Plea of guilty.

Mr. WOODS.—We object to that, and move to strike the answer.

The COURT.—Objection overruled.

Mr. WOODS.—We note an exception.

The COURT.—Exception allowed.

Mr. WRIGHT.—May it be understood that the objection of the defendant James Reese goes to this evidence as being too remote; and may we have an exception to the ruling?

The COURT.—Exception allowed. (Pp. 12, 13 and 14, Bill of Exceptions.)

III.

The Court erred in admitting Government's Exhibit No. 3.

IV.

The Court erred in overruling the motion of the defendant [95] Dave Nielson for an instructed ver-

dict at the close of the Government's case. (Pp. 35, Bill of Exceptions.)

V.

The Court erred in overruling the motion of the defendant Dave Nielson to strike the testimony of Mark Y. Croxall and to withdraw it from the consideration of the jury, said testimony being all of the testimony relating to the arrest and plea of guilty of Dave Nielson more than two years ago. (Pp. 37, Bill of Exceptions.)

• VI.

The Court erred in sustaining the objection of the Government and instructing the jury to disregard the following testimony of S. W. Austin.

Q. (By Mr. WOODS, for the Defendants Nielson.) Did you know about his going fishing?

A. Yes. When he was buying fishing tackle he made the remark that he was going fishing.

Mr. GORDON.—I object to what he said and ask the jury be instructed to disregard it.

The COURT.—Objection sustained. The jury will disregard what was said.

Mr. WOODS.—Exception.

The COURT.—Exception allowed. (Pp. 45, Bill of Exceptions.)

VII.

The Court erred in overruling the motion of the defendant Dave Nielson in arrest of judgment.

VIII.

The Court erred in overruling the motion of the defendant Dave Nielson for a new trial. [96]

IX.

The Court erred in pronouncing judgment and sentence against the defendant Dave Nielson.

WHEREFORE, the defendant Dave Nielson, hereinafter to be known as one of the plaintiffs in error, prays that the judgment of said court be reversed and said cause remanded with instructions to said court to grant a new trial to the defendant Dave Nielson.

FRANK S. CARROLL,
WESLEY LLOYD,
A. J. CROTEAU,

Attorneys for Plaintiff in Error Dave Nielson.

Service of the foregoing assignment of error by delivery of a copy thereof to the undersigned is hereby acknowledged this 22d day of November, 1926.

BERTIL E. JOHNSON,
Assistant United States Attorney.

Filed Nov. 30, 1926. [97]

ASSIGNMENT OF ERRORS CLAIMED BY
CHARLES NIELSON.

Comes now Charles Nielson, one of the above-named defendants, and serves and files the following separate assignment of errors upon which he, as one of the plaintiffs in error, will rely in the prosecution of the writ of error herein to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence

herein entered and imposed on the 6th day of July, 1926:

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Mr. WOODS.—I object to that. Do you

mean to say you arrested him there on this charge involved in this case?

A. Not in this case, no.

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A. Yes.

The COURT.—Objection overruled.

Mr. WOODS.—Exception. * * *

Mr. WRIGHT.—The defendant Reese objects to that evidence as being entirely too remote, and in no way connecting him with it.

The COURT.—Objection will be overruled.
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Mr. WRIGHT.—Exception.

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Q. Did you find Dave Nielson at that still?

A. Yes.

Mr. WOODS.—We object to that for the further reason that there is no contention of an overt act at that time. The only contention as

to an overt act is these set forth in the complaint here made.

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A. He was running the still.

Q. Was he afterwards charged with that offense in this court? A. He was.

Q. What was his plea to that charge?

A. Plea of guilty.

Mr. WOODS.—We object to that, and move to strike the answer.

The COURT.—Objection overruled.

Mr. WOODS.—We note an exception.

The COURT.—Exception allowed.

Mr. WRIGHT.—May it be understood that the objection of the defendant James Reese goes to this evidence as being too remote; and may we have an exception to the ruling?

The COURT.—Exception allowed. (Pp. 12, 13 and 14, Bill of Exceptions.)

III.

The Court erred in admitting Government's Exhibit No. 3.

IV.

The Court erred in overruling the motion of the defendant [100] Charles Nielson for an instructed verdict at the close of the Government's case. (Pp. 35, Bill of Exceptions.)

V.

The Court erred in overruling the motion of the defendant Charles Nielson to strike the testimony of Mark Y. Croxall and to withdraw it from the consideration of the jury, said testimony being all of the testimony relating to the arrest and plea of guilty of Dave Nielson more than two years ago. (P. 37, Bill of Exceptions.)

VI.

The Court erred in sustaining the objection of the Government and instructing the jury to disregard the following testimony of S. W. Austin:

Q. (By Mr. WOODS, for the Defendants Nielson.) Did you know about his going fishing?

A. Yes. When he was buying fishing tackle he made the remark that he was going fishing.

Mr. GORDON.—I object to what he said and ask the jury be instructed to disregard it.

The COURT.—Objection sustained. The jury will disregard what was said.

Mr. WOODS.—Exception.

The COURT.—Exception allowed. (Pp. 45, Bill of Exceptions.)

VII.

The Court erred in overruling the motion of the defendant Charles Nielson in arrest of judgment.

VIII.

The Court erred in overruling the motion of the defendant Charles Nielson for a new trial. [101]

IX.

The Court erred in pronouncing judgment and sentence against the defendant Charles Nielson.

WHEREFORE, the defendant Charles Nielson, hereinafter to be known as one of the plaintiffs in error, prays that the judgment of said Court be reversed and said cause remanded with instructions to said court to grant a new trial to the defendant Charles Nielson.

FRANK S. CARROLL,
WESLEY LLOYD,
A. J. CROTEAU,

Attorneys for Plaintiff in Error Charles Nielson.

Service of the foregoing assignment of errors by delivery of a copy thereof to the undersigned is hereby acknowledged this 22d day of November, 1926.

BERTIL E. JOHNSON,
Assistant United States Attorney.

[Indorsed]: Filed Nov. 30, 1926. [102]

ASSIGNMENT OF ERRORS CLAIMED BY
JAMES E. REESE.

Comes now James E. Reese, one of the above-named defendants, and serves and files the following separate assignment of errors upon which he, as one of the plaintiffs in error, will rely in the prosecution of the writ of error herein to the United States Circuit Court of Appeals for the Ninth Cir-

cuit from the judgment and sentence herein entered and imposed on the 6th day of July, 1926:

I.

The Court erred in denying the petition of Noland Nelson to suppress evidence, i. e.: A small quantity of whiskey found in a shack occupied by said Noland Nelson as his home, which said home was searched without warrant of law. (Pp. 4 and 4, Bill of Exceptions.)

In that connection, the Court further erred in excluding testimony as follows:

MARK Y. CROXALL.—(Cross-examination.) We entered Nelson's house.

Q. Did you have a warrant for that?

Mr. GORDON.—(District Attorney.) Objected to as immaterial. [103]

The COURT.—Objection sustained.

Mr. WOODS.—Exception.

WITNESS.—(Continuing.) The bottle of whiskey was found in Nelson's cabin on the bed. (Said bottle of whiskey referred to being marked Government's Exhibit No. 3.) (Pp. 16 and 17, Bill of Exceptions.)

II.

The Court erred in placing the defendant James E. Reese upon trial without arraignment or plea to the indictment.

III.

The Court erred in permitting the witness Mark Y. Croxall to testify as follows:

Mr. CROXALL.—I do not know whether Dave (Nielson) was living at the Oscar Nielson

place at the time or not. I know I arrested him there.

Mr. WOODS.—I object to that. Do you mean to say you arrested him there on this charge involved in this case?

A. Not in this case, no.

The COURT.—Objection overruled. Was it before this case?

A. Yes.

The COURT.—Objection overruled.

Mr. WOODS.—Exception. * * *

Mr. WRIGHT.—The defendant Reese objects to that evidence as being entirely too remote, and in no way connecting him with it.

The COURT.—Objection will be overruled.

* * *

Mr. WRIGHT.—Exception.

The COURT.—Allowed. (Pp. 10 and 11, Bill of Exceptions.)

The Court further erred in permitting the witness Mark Y. Croxall to testify further as follows:

Q. (By the District Attorney.) At the time you have spoken of (referring to an occasion about two or three years ago), when you drank some whiskey that tasted like this near Oscar Nielson's cabin, where did you find that whiskey? [104]

A. Some whiskey was found in the barn on Oscar Nielson's place. The same party found it at the still where Dave Nielson was.

Q. Did you find Dave Nielson at that still?

A. Yes.

Mr. WOODS.—We object to that for the further reason that there is no contention of an overt act at that time. The only contention as to an overt act is these set forth in the complaint here made.

The COURT.—You are not confined to overt acts to show the arrest of the defendant Dave Nielson. Objection overruled.

Mr. WOODS.—Exception.

Q. What was Dave Nielson doing apparently at the still at that time two years ago?

A. He was running the still.

Q. Was he afterwards charged with that offense in this Court? A. He was.

Q. What was his plea to that charge?

A. Plea of guilty.

Mr. WOODS.—We object to that, and move to strike the answer.

The COURT.—Objection overruled.

Mr. WOODS.—We note an exception.

The COURT.—Exception allowed.

Mr. WRIGHT.—May it be understood that the objection of the defendant James Reese goes to this evidence as being too remote; and may we have an exception to the ruling?

The COURT.—Exception allowed. (Pp. 12, 13 and 14, Bill of Exceptions.)

IV.

The Court erred in admitting Government's Exhibit No. 3.

V.

The Court erred in overruling the motion of the

defendant [105] James E. Reese to strike the testimony of Mark Y. Croxall and to withdraw it from the consideration of the jury, said testimony being all of the testimony relating to the arrest and plea of guilty of Dave Nielson more than two years ago. (Pp. 37, Bill of Exceptions.)

VI.

The Court erred in overruling the motion of the defendant Reese, at the close of all of the Government's testimony, to dismiss. (Pp. 37 and 38, Bill of Exceptions.)

VII.

The Court erred in overruling the motion of the defendant James E. Reese in arrest of judgment.

VIII.

The Court erred in overruling the motion of the defendant James E. Reese for a new trial.

IX.

The Court erred in pronouncing judgment and sentence against the defendant James E. Reese.

WHEREFORE, the defendant James E. Reese, hereinafter to be known as one of the plaintiffs in error, prays that the judgment of said court be reversed and said cause remanded with instructions to said Court to grant a new trial to the defendant James E. Reese.

FRANK S. CARROLL,
WESLEY LLOYD,
A. J. CROTEAU,

Attorneys for Plaintiff in Error James E. Reese.

Service of the foregoing assignment of error by delivery of a copy thereof to the undersigned is hereby acknowledged this 22d day of November, 1926.

BERTIL E. JOHNSON,
Assistant United States Attorney.

[Indorsed]: Filed Nov. 30, 1926. [107]

ORDER ALLOWING WRIT OF ERROR.

Now, on this 29th day of November, 1926, came the defendants Dave Nielson, Charles Nielson and James E. Reese and filed herein and prestended to the Court their petition praying for the allowance of a writ of error intended to be urged by them; and praying also that a transcript of the records, proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises,—

NOW, THEREFORE, upon consideration of said petition and being fully advised in the premises, the Court does hereby allow said writ of error; and

IT IS BY THE COURT FURTHER ORDERED that until the period of fifteen days shall have expired from the date hereof, the defendants and each of them shall be enlarged upon their present bonds; and the defendants, and each of them, shall have said period of fifteen days in which

to prosecute their applications for a supersedeas in the Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN,

Judge.

Service of the within order by delivery of a copy to the undersigned is hereby acknowledged this 29th day of November, 1926.

BERTIL E. JOHNSON,
Assistant U. S. District Atty.

[Indorsed]: Filed Nov. 30, 1926. [108]

WRIT OF ERROR.

United States of America,
Ninth Judicial Circuit.

The President of the United States of America: To
the Honorable Judge of the District Court of
the United States for the Western District of
Washington, Southern Division:

Because, in the records and proceedings, as also in the rendition of judgment of a plea, which is in the said District Court before you, between the United States as plaintiff and Dave Nielson, Charles Nielson and James E, Reese as defendants, a manifest error hath happened to the great damage of the said defendants and each of them as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then, under your seal, distinctly and

openly, you send the records and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of [109] California, where said court is sitting, within thirty days from the date hereof, to wit: 4th day of January, 1927, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States of America, this 4th day of December, 1926.

ED. M. LAKIN,
Clerk of the United States District Court for the
Western District of Washington, Southern
Division.

By Alice Huggins,
Deputy Clerk.

[Indorsed]: Filed Dec. 4, 1926. [110]

**NOTICE OF APPLICATION FOR ORDER OF
SUPERSEDEAS, ETC.**

To the United States of America and to the United States District Attorney for the Western District of Washington:

You, and each of you, will please take notice that on Thursday, the 9th day of December, 1926, at the hour of ten o'clock in the forenoon of said date, or as soon thereafter as counsel can be heard, the defendants, and each of them herein, will make application to the Honorable Edward E. Cushman, Judge of the United States District Court for the Western District of Washington, Southern Division, holden at Tacoma, for an order of supersedeas in conjunction with the writ of error herein sued out, and will at the same time make application to said Court for the approval of the writ of error bonds of the defendants, and each of them.

WESLEY LLOYD,
A. J. CROTEAU,
FRANK A. CARROLL,
Attorneys for Defendants,

Perkins Building, Tacoma, Washington. [111]

Due and timely service of the above and foregoing notice admitted this 8th day of December, 1926; and further notice of time and place of the application herein noticed to be made is waived.

BERTIL E. JOHNSON,
Assistant United States District Attorney.

[Indorsed]: Filed Dec. 8, 1926. [112]

AFFIDAVIT OF WESLEY LLOYD.

United States of America,
Western District of Washington,
Southern Division,—ss.

Wesley Lloyd, being first on his oath duly sworn, deposes and says; That he is one of counsel for the defendants above named; and that heretofore, on behalf of said defendants as plaintiffs in error, he has sued out his writ of error and lodged said writ in the office of the Clerk of the United States Circuit Court for the Ninth Circuit, together with his affidavit setting forth in detail the steps taken to perfect the writ of error in said cause.

Affiant further says that this Court heretofore at the time of the granting of the writ of error, orally declined to make an order of supersedeas and fix the supersedeas bond, but allowed the defendants fifteen days from the date of the granting of the writ of error, to wit: The 30th day of November, 1926, in which to *such for* the order of supersedeas in the United States Circuit Court of Appeals for the Ninth Circuit. That pursuant thereto, affiant on behalf of the defendants presented a motion for supersedeas supported by his affidavit setting forth all of the facts disclosed by the [113] record herein, together with his stipulation with the Assistant United States District Attorney that said motion might be heard without the appearance of counsel and without notice; and that said matter was thereupon presented, as affiant is informed and be-

lieves, to the United States Circuit Court of Appeals, or one of the Judges thereof, at San Francisco, by the Clerk of said Court; and that the Judges of said Circuit Court of Appeals declined to act upon said application for supersedeas until the complete record shall have been filed in said court.

Affiant further says that said Circuit Court of Appeals, or the Judges thereof, as affiant is informed and believes, prefer that the District Court act definitely and make an order either denying or granting the application for supersedeas; and that said Circuit Court of Appeals, or the Judges thereof, have, through the Clerk of said Court, communicated their desires in that respect to affiant.

Affiant further says that his information and belief herein related is based upon a telegram received from the Clerk of said Circuit Court of Appeals, a copy of which is hereto attached, marked Exhibit "A," and by reference made a part of this affidavit.

Affiant further says that in the ordinary course of proceedings, it will be impossible to procure the completed record on the writ of error herein sued out and file the same in the office of the Clerk of said Circuit Court of Appeals prior to the first day of January, 1927.

Affiant further says that he makes this affidavit in support of his application to be presented in open court to the Judge of said District Court as hereinafter to be noticed for the order of supersedeas and the approval of the writ of error bond to be tendered with the said application. [114]

And further affiant saith not.

WESLEY LLOYD.

Subscribed and sworn to before me this 8th day
of December, 1926.

A. J. CROTEAU,
Notary Public in and for the State of Washington,
Residing at Tacoma.

[Indorsed]: Received copy Dec. 8th, 1926.

BERTIL E. JOHNSON,
H.

Asst. U. S. Attorney.

[Indorsed]: Filed Dec. 8, 1926. [115]

EXHIBIT "A."

December 7, 1926.

San Francisco, California.

Motion for supersedeas Nielson et al. versus Gov-
ernment received. Granting supersedeas discre-
tionary. Court will not act without record. Pre-
fers that District Court act definitely by granting or
denying application.

O'BRIEN,
Deputy Clerk.

[Indorsed]: Filed Dec. 8, 1926. [116]

COPY OF JOURNAL RECORD.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division of said District on the 9th day of December, 1926, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court as follows:

[Title of Cause.]

HEARING.

Now on this 9th day of December, 1926, each of the within named defendants having noted application for an order fixing the amount and approving of supersedeas bail pending appeal herein, the Court denies the application of each defendant, holding that it has no jurisdiction to do so. [117]

**COST BOND OF JAMES E. REESE ON WRIT
OF ERROR.**

KNOW ALL MEN BY THESE PRESENTS: That we, James E. Reese, as principal, and The Columbia Casualty Company of New York, as sureties, are held and firmly bound unto the United States of America in the above-entitled action in the full penal sum of \$200.00, lawful money of the United States, for the payment of which, well and

truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of the above and foregoing obligation is such that,

WHEREAS, the above-named principal, James E. Reese, was on the 30th day of June, 1926, found guilty of knowingly, wilfully, unlawfully and feloniously combining, conspiring, confederating and agreeing with Dave Nielson, Charles Nielson, Noland Nelson and divers other persons to commit certain offenses against the United States, that is to say, to violate Section 37 of the Penal Code, known as the National Prohibition Act and certain statutes in aid of the revenue of the United States; and was, on the 2d day of July, 1926, sentenced to serve a period of [118] three months in the Pierce County Jail of the State of Washington and to pay to the United States a fine of \$250.00 and the costs of prosecution, which said judgment and sentence of the Court was pronounced in pursuance of the verdict of a jury theretofore duly and regularly returned against said defendant in said cause; and

WHEREAS, the said James E. Reese has sued out his writ of error in said cause to the Circuit Court of Appeals of the United States of America for the Ninth Circuit;

NOW, THEREFORE, if the above-bounden principal, James E. Reese, shall diligently prosecute said writ of error to effect; and if he fail to make his plea good shall answer all damages and costs in connection with the suing out of said writ of error,

then this obligation to be null and void; otherwise to be and remain in full force and effect.

IN TESTIMONY WHEREOF, we have hereunto set our hands and seals this 10th day of December, A. D. 1926.

Principal.

THE COLUMBIA CASUALTY COMPANY OF N. Y.

[Seal]

By R. E. MAHAFFAY,
Attorney-in-Fact.
Sureties.

[Indorsed]: Filed Dec. 10, 1926. [119]

United States of America,
State of Washington,
County of Pierce,—ss.

I, the undersigned, a notary public in and for the State of Washington, do hereby certify that on this 10th day of December, 1926, personally appeared before me R. E. Mahaffay, to me known to be the attorney-in-fact for the Columbia Casualty Company of New York and to be the individual who executed the within and foregoing bond for and on behalf of the said Columbia Casualty Company of New York; and that he acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned; that he stated to me that he was authorized so to do.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

A. J. CROTEAU,
Notary Public in and for the State of Washington,
Residing at Tacoma. [119-A]

**COST BOND OF DAVE NIELSON ON WRIT
OF ERROR.**

KNOW ALL MEN BY THESE PRESENTS: That we, Dave Nielson, as principal, and The Columbia Casualty Company of New York, as sureties, are held and firmly bound unto the United States of America in the above-entitled action in the full penal sum of \$200.00, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of the above and foregoing obligation is such that,

WHEREAS, the above-named principal, Dave Nielson, was on the 30th day of June, 1926, found guilty of knowingly, wilfully, unlawfully and feloniously combining, conspiring, confederating and agreeing with Charles Nielson, James E. Reese, Noland Nelson and divers other persons to commit certain offenses against the United States, that is to say, to violate Section 37 of the Penal Code, known as the National Prohibition Act and certain statutes

in aid of the revenue of the United States; and was, on the 2d day of July, 1926, sentenced to serve a period of [120] one year and one day in the United States Penitentiary at McNeils Island and to pay to the United States a fine of \$1,000.00 and the costs of prosecution, which said judgment and sentence of the Court was pronounced in pursuance of the verdict of a jury theretofore duly and regularly returned against said defendant in said cause; and

WHEREAS, the said Dave Nielson has sued out his writ of error in said cause to the Circuit Court of Appeals of the United States of America for the Ninth Circuit;

NOW THEREFORE, if the above bounden principal, Dave Nielson, shall diligently prosecute said writ of error to effect; and if he fail to make his plea good shall answer all damages and costs in connection with the suing out of said writ of error, then this obligation to be null and void; otherwise to be and remain in full force and effect.

IN TESTIMONY WHEREOF, we have hereunto set our hands and seals this 10th day of December, A. D. 1926.

DAVE NIELSON,
Principal.

COLUMBIA CASUALTY COMPANY OF
N. Y.

[Seal]

By R. E. MAHAFFAY,
Attorney-in-Fact.
Sureties.

[Indorsed]: Filed Dec. 10, 1926. [121]

United States of America,
State of Washington,
County of Pierce,—ss.

I, the undersigned, a notary public in and for the State of Washington, do hereby certify that on this 10th day of December, 1926, personally appeared before me R. A. Mahaffay, to me known to be the attorney-in-fact for the Columbia Casualty Company of New York and to be the individual who executed the within and foregoing bond for and on behalf of the said Columbia Casualty Company of New York; and that he acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned; that he stated to me that he was authorized so to do.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

A. J. CROTEAU,
Notary Public in and for the State of Washington,
Residing at Tacoma. [121-A]

COST BOND OF CHARLES NIELSON ON
WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS:
That we, Charles Nielson, as principal, and The Columbia Casualty Company of New York, as sureties, are held and firmly bound unto the United States of America in the above-entitled action in the

full penal sum of \$200.00, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of the above and foregoing obligation is such that,

WHEREAS, the above-named principal, Charles Nielson, was on the 30th day of June, 1926, found guilty of knowingly, wilfully, unlawfully and feloniously combining, conspiring, confederating and agreeing with Dave Nielson, James E. Reese, Noland Nelson and divers other persons to commit certain offenses against the United States, that is to say, to violate Section 37 of the Penal Code, known as the National Prohibition Act and certain statutes in aid of the revenue of the United States; and was, on the 2d day of July, 1926, sentenced to serve a period of [122] six months in the Pierce County Jail of the State of Washington and to pay to the United States a fine of \$500.00 and the costs of prosecution, which said judgment and sentence of the Court was pronounced in pursuance of the verdict of a jury theretofore duly and regularly returned against said defendant in said cause; and

WHEREAS, the said Charles Nielson has sued out his writ of error in said cause to the Circuit Court of Appeals of the United States of America for the Ninth Circuit;

NOW, THEREFORE, if the above-bounden principal, Charles Nielson, shall diligently prosecute said writ of error to effect; and if he fail to

make his plea good shall answer all damages and costs in connection with the suing out of said writ of error, then this obligation to be null and void; otherwise to be and remain in full force and effect.

IN TESTIMONY WHEREOF, we have hereunto set our hands and seals this 10th day of December, A. D. 1926.

CHARLES NIELSON,
Principal.

COLUMBIA CASUALTY COMPANY OF
N. Y.

[Seal] By R. E. MAHAFFAY,
Attorney-in-fact,
Sureties.

[Indorsed]: Filed Dec. 10, 1926. [123]

United States of America,
State of Washington,
County of Pierce,—ss.

I, the undersigned, a notary public in and for the State of Washington, do hereby certify that on this 10th day of December, 1926, personally appeared before me R. E. Mahaffay, to me known to be the attorney in-fact for the Columbia Casualty Company of New York and to be the individual who executed the within and foregoing bond for and on behalf of the said Columbia Casualty Company of New York; and that he acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned; that he stated to me that he was authorized so to do.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed my official seal the day and year in this certificate first above written.

A. J. CROTEAU,
Notary Public in and for the State of Washington,
Residing at Tacoma. [123-A]

CITATION ON WRIT OF ERROR.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein Dave Nielson, Charles Nielson, and James E. Reese are plaintiffs in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court for the Western District of Washington, this 10th day of December, 1926.

EDWARD E. CUSHMAN,
Judge. [124]

Service of the foregoing citation admitted this
— day of December, 1926.

Asst. United States Attorney. [125]

PRAEICE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court
for the Western District of Washington,
Southern Division:

You will please make a transcript of the record
on the writ of error to the United States Circuit
Court of Appeals for the Ninth Circuit in the
above-entitled cause, omitting all captions except
on the indictment, and include therein the follow-
ing:

Indictment.

Arraignment and plea.

Demurrers.

Motion for a bill of particulars.

Motion to suppress evidence.

Affidavit in support of motion to suppress evidence.

Verdict.

Motion for a new trial.

Motion in arrest of judgment.

Order denying motion for a new trial.

Order denying motion in arrest of judgment.

Judgment and sentence.

Stipulations and orders extending time for filing.

Bill of exceptions.

Notice of lodgment of bill of exceptions with Clerk.

Order settling bill of exceptions.

Petitions for writ of error.

Assignments of error.

Order allowing writ of error.

Writ of error.

Citation, with acceptance of service thereon.

Cost bond.

Notice of application for supersedeas.

Affidavit in support of motion for supersedeas, and
order denying supersedeas; order extending
term, and [126]

This praecipe, with acceptance of service thereon.

LLOYD & CROTEAU,

FRANK S. CARROLL,

Attorneys for Defendants,

Office and P. O. Address:

140 Perkins Building, Tacoma, Washington.

Service of the within praecipe by delivery of a
copy to the undersigned is hereby acknowledged
this 10th day of December, 1926.

BERTIL E. JOHNSON,

Assistant United States District Attorney.

[Indorsed]: Filed Dec. 10, 1926. [127]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,

Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States
District Court for the Western District of Wash-

ington, do hereby certify that the foregoing type-written pages numbered from one to one hundred twenty-eight inclusive, are a full, true and correct copy of the record and proceedings in Cause No. 5436, United States of America, Plaintiff, *versus* Dave Nielsen, Charles Nielsen and James Clifford Reese, Defendants, in said District Court, as required by praecipe of counsel filed and shown herein and as the same remain of record in the office of the Clerk of said District Court, and that the same is transmitted herewith and constitutes my return herein.

I further certify that I hereto attach and transmit the original citation in said cause with acceptance of service thereon.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office on behalf of the plaintiffs in error for making the record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's Fees (Act Feb. 11, 1925) for making record and return, 270 folios @ 15¢.. \$40.00
Appeal \$ 5.00
Seal \$.50

Attest my hand and the seal of said District Court at Tacoma, Washington, in said District this 10th day of December, A. D. 1926.

[Seal]

ED. M. LAKIN,

Clerk.

By Alice Huggins,
Deputy. [128]

[Endorsed]: No. 5021. United States Circuit Court of Appeals for the Ninth Circuit. Dave Nielson, Charles Nielson and James E. Reese, Plaintiffs in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed December 13, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit, Holden at San Francisco,
California.

No. —.

DAVE NIELSON, CHARLES NIELSON, and
JAMES E. REESE,

Plaintiffs in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

MOTION FOR SUPERSEDEAS.

Come now the plaintiffs in error above named and move the Court for an order of supersedeas in the above-entitled case superseding and staying

the judgment of the District Court for the Western District of Washington, Southern Division; upon such terms and conditions as to this Court may in the premises seem just and proper.

This motion is based upon the records and files of this case now before the Court, and especially upon the affidavit of Wesley Lloyd, one of counsel for the plaintiffs in error, herewith filed.

WESLEY LLOYD,

A. J. CROTEAU,

FRANK S. CARROLL,

Attorneys for Plaintiffs in Error,

Office and P. O. Address:

140 Perkins Building, Tacoma, Washington.

Copy received this 4th day of December, 1926.

BERTIL E. JOHNSON,

Asst. U. S. Atty.

In the United States Circuit Court of Appeals for
the Ninth Circuit, Holden at San Francisco,
California.

No. —.

DAVE NIELSON, CHARLES NIELSON, and
JAMES E. REESE,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

AFFIDAVIT OF WESLEY LLOYD.

United States of America,
Western District of Washington,
Southern Division,—ss.

Wesley Lloyd, being first on his oath duly sworn, deposes and says: That the plaintiffs in error herein were by a verdict of the jury duly returned into court on the 30th day of June, 1926, found guilty of confederating, conspiring and agreeing among themselves unlawfully and feloniously to violate certain laws of the United States of America, namely: Section 37 of the Penal Code, commonly known as the National Prohibition Act, and certain acts and statutes in aid of the revenue of the United States; and that thereafter on the next day they caused to be filed and served their motions in arrest of judgment and for a new trial. That the motion in arrest of judgment was argued before the District Court for the Western District of Washington, Southern Division, on the 2d day of July, 1926; and that said motion in arrest of judgment was by the Court considered and denied, but that the motion for a new trial was not heard on said day but was passed over for further consideration by the District Court until a later date; but that the Court immediately proceeded to and did pass judgment and sentence against these plaintiffs in error as follows: Sentencing the above-named plaintiff in error Dave Nielson to imprisonment in the United States Penitentiary at McNeil Island for one year and one day and to

pay a fine of \$1,000.00, besides the costs of prosecution; and sentencing the above-named plaintiff in error Charles Nielson to imprisonment in the Pierce County Jail for a period of six months and to pay to the United States a fine of \$500.00 besides the costs of prosecution; and sentencing the above-named plaintiff in error James E. Reese to imprisonment in the Pierce County Jail for a period of three months and to pay to the United States a fine of \$250.00 besides the costs of prosecution; and that thereafter and while said motion for a new trial was pending and undetermined and before the expiration of 42 days the term of said District Court then sitting was ended, but that said term was by order of said Court continued for all matters pertaining to said case, and within the time for filing and for presentation and allowance of the bill of exceptions, was by said District Court extended. And that within said time as extended said bill of exceptions was lodged in the office of the District Clerk for said District and a copy thereof served upon the District Attorney for said district. And that thereafter at the time fixed by the Court upon order, said bill of exceptions was by the Court settled and certified and is now of record in the office of said Clerk for said District.

Affiant further says that the hearing upon the motion for a new trial was continued from law day to law day upon two separate occasions and at the first available opportunity, i. e. on the 11th day of October, 1926, said motion for a new trial was presented to the District Judge and argued by coun-

sel for the respective parties and considered by said District Judge; and said motion was denied, to which the plaintiffs in error were allowed their exception.

That thereafter on, to wit, the 2d day of December, 1926, and within six months after the rendition of final judgment in said case and within sixty days after the determination of the motion for a new trial, the plaintiffs in error caused to be filed in said District Court their petition for a writ of error, together with their assignments of error; and that thereupon the said District Court allowed said writ of error by order duly made and entered, a copy of which order is hereto attached marked Exhibit "A," and by reference made a part of this affidavit.

Affiant further says that on the 4th day of December, 1926, said writ of error was duly attested by the Clerk of the United States District Court for the Western District of Washington, Southern Division, which said writ is herewith filed; and that said writ was on the same day served by lodging a copy thereof in the office of the Clerk of said District Court at Tacoma, the same being the place where the record of said case remains.

Affiant further says that said District Judge in said order herein referred to allowed the plaintiffs in error a period of 15 days after the 2d day of December in which to sue out their application for the supersedeas during the prosecution of the writ of error, and which said order provided that during said interval of 15 days the plaintiffs in er-

ror should be enlarged upon their recognizance theretofore entered into.

Affiant further says that said writ of error is prosecuted in good faith on behalf of each of the plaintiffs in error; that he believes the same to be well founded in law and meritorious; and that the purpose of the prosecution of said writ of error is to correct what affiant believes to be a manifest error of said District Court; and that it is not prosecuted to delay the speedy administration of justice; and that unless said supersedeas be allowed the plaintiffs in error will by virtue of the premises be imprisoned during the determination of said writ of error and will thereby be entirely deprived of the fruits of their writ of error if prosecuted to a successful conclusion.

Affiant further says that he has caused the above-entitled matter to be docketed in the said Circuit Court of Appeals for the Ninth Circuit and has filed herewith the writ of error and has ordered, and has by his praecipe directed the preparation of the record and certification thereof, and a citation; and that the same will be filed in this court as soon as prepared and certified by the officer having charge thereof.

Affiant further says that he makes this affidavit in support of his application for and on behalf of the plaintiffs in error, and each of them, for an allowance of supersedeas to be issued in the sound discretion of this Court, directing that pending the final determination of the writ of error herein filed that the judgment of the District Court be stayed

and superseded upon such terms and conditions as may seem proper in the premises.

And further affiant saith not.

WESLEY LLOYD.

Subscribed and sworn to before me this 4th day of December, 1926.

[Seal] CROTEAU,
Notary Public in and for the State of Washington,
Residing at Tacoma.

EXHIBIT "A."

United States District Court, Western District of Washington, Southern Division.

No. 5436.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVE NIELSON, CHARLES NIELSON,
JAMES E. REESE and NOLAND NELSON,

Defendants.

ORDER.

Now, on this 29th day of November, 1926, came the defendants Dave Nielson, Charles Nielson and James E. Reese and filed herein and presented to the Court their petition praying for the allowance of a writ of error intended to be urged by them; and praying also that a transcript of the records, proceedings and papers upon which judgment

herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises.

NOW, THEREFORE, upon consideration of said petition, and being fully advised in the premises, the Court does hereby allow said writ of error; and it is by the Court further ORDERED that until the period of 15 days shall have expired from the date hereof the defendants, and each of them, shall be enlarged upon their present bonds and the defendants, and each of them, shall have said period of 15 days in which to prosecute their application for a supersedeas in the Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN,
Judge.

Service of the within order by delivery of a copy to the undersigned is hereby acknowledged this 29th day of November, 1926.

BERTIL E. JOHNSON,
Asst. U. S. District Atty.

Endorsed and filed in the United States District Court, Western District of Washington, Southern Division, November 30, 1926.

EDWARD M. LAKIN,
Clerk.
By E. Redmayne,
Deputy.

Copy of the within affidavit received this 4th day
of December, 1926.

BERTIL E. JOHNSON,
Asst. U. S. Atty.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

DAVE NIELSON, CHARLES NIELSON and
JAMES E. REESE,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

STIPULATION RE HEARING MOTION FOR
SUPERSEDEAS.

IT IS HEREBY STIPULATED by and between the plaintiffs in error and the defendant in error that the motion of the plaintiffs in error for supersedeas may be heard by the Court without the same being regularly placed upon the docket and that said motion may be submitted to the Court without the presence of counsel.

Dated this fourth day of December, 1926.

WESLEY LLOYD,

A. J. CROTEAU,

FRANK S. CARROLL,

Attorneys for Plaintiffs in Error.

THOS. P. REVELLE,

United States Attorney,

BERTIL E. JOHNSON,

Asst. United States Attorney,

Attorneys for Defendant in Error.

[Endorsed]: Filed Dec. 7, 1926. F. D. Monckton, Clerk.

United States District Court, Western District of Washington, Southern Division.

No. 5436.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVE NIELSON, CHARLES NIELSON,
JAMES E. REESE and NOLAND
NELSON,

Defendants.

WRIT OF ERROR.

United States of America,
Ninth Judicial Circuit.

The President of the United States of America:
To the Honorable Judge of the District Court
of the United States for the Western District
of Washington, Southern Division:

Because, in the records and proceedings, as also
in the rendition of judgment of a plea, which is in
the said District Court before you, between the
United States as plaintiff and Dave Nielson, Charles
Neilson and James E. Reese as defendants, a mani-
fest error hath happened to the great damage of the
said defendants and each of them as by their com-
plaint appears, we being willing that error, if any
hath been, should be duly corrected, and full and
speedy justice done to the parties aforesaid in this
behalf, do command you, if judgment be given
therein, that then, under your seal, distinctly and
openly, you send the records and proceedings afore-
said with all things concerning the same, to the
United States Circuit Court of Appeals for the
Ninth Circuit, together with this writ, so that
you have the same at the City of San Francisco,
in the State of California, where said court is sit-
ting, within thirty days from the date hereof, to wit:
4th day of January, 1927, in the said Circuit Court
of Appeals to be then and there held, that the record
and proceedings aforesaid be inspected, the said
Circuit Court of Appeals may cause further to be

done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States of America, this 4th day of December, 1926.

[Seal]

ED. M. LAKIN,

Clerk of the United States District Court for the Western District of Washington, Southern Division.

By Alice Huggins,
Deputy Clerk.

Service admitted Dec. 4th, 1926.

BERTIL E. JOHNSON,
Asst. U. S. Atty.

Filed Dec. 4, 1926.

[Endorsed]: Filed Dec. 7, 1926. F. D. Monckton,
Clerk.

No. 5021

United States
Circuit Court of Appeals
For the Ninth Circuit.

DAVE NIELSON, CHARLES NIELSON, and
JAMES E. REESE,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Supplemental Transcript of Record.

Upon Writ of Error to the United States District Court
of the Western District of Washington,
Southern Division.

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

LLOYD, WESLEY, Perkins Building, Tacoma,
Washington,

CROTEAU, A. J., Perkins Building, Tacoma,
Washington,

CARROLL, FRANK S., Equitable Building, Ta-
coma, Washington,

Attorneys for Plaintiffs in Error.

REVELLE, THOS. P., United States District At-
torney for the Western District of Washing-
ton, Federal Building, Seattle, Washington,

JOHNSON, BERTIL E., Assistant U. S. District
Attorney, Federal Building, Tacoma, Wash-
ington,

Attorneys for Defendant in Error. [1*]

In the United States District Court, Western Dis-
trict of Washington, Southern Division.

No. 5,436.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVE NIELSEN, CHARLES NIELSEN,
JAMES E. REESE and NOLAND NEL-
SON,

Defendants.

*Page-number appearing at the foot of page of original certified
Supplemental Transcript of Record.

BAIL BOND OF DAVE NIELSEN.

KNOW ALL MEN BY THESE PRESENTS, That we, Dave Nielsen, as principal, and John P. Jensen and Clara Jensen, his wife, as sureties, are held and firmly bound unto the United States of America in the penal sum of Three Thousand (\$3,000) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

WITNESS our hands this 12th day of June, 1926.

The condition of the above obligation is such, that whereas, an indictment or information has been filed with the Clerk of the above-entitled court, a warrant issued thereon charging the said principal with conspiracy to violate Section 37, P. C. (National Prohibition Act and Revenue Acts), and the said principal has been held to appear and answer for trial.

NOW, THEREFORE, if the said principal shall appear and answer the charge above mentioned on the 12th day of June, 1926, and from time to time and from term to term to which the said case may be continued then and there to answer the said charge and shall at all times hold himself amenable to the order and process of the Court and if convicted will appear for judgment and render himself in execution thereof, then this obliga-

tion [2] shall be null and void and of no effect; otherwise to remain and be in full force and effect.

DAVE NIELSEN,
Principal.
JOHN P. JENSEN,
CLARA JENSEN,
Sureties.

United States of America,
State of Washington,
County of Pierce,—ss.

John P. Jensen, being first duly sworn on oath, deposes and says: That he is not an attorney or counsellor at law, sheriff, clerk or officer of any court; that he is a resident of the State of Washington and that he and his wife, Clara Jensen, as a community are the owners of

The Northwest quarter of Section 12, Township 16, North Range 3 East W. M.
and that the same is of the value of more than Five Thousand (\$5,000) Dollars; the said community is worth more than the sum of Five Thousand (\$5,000) Dollars above all just debts and liabilities and property exempt from execution.

JOHN P. JENSEN.

Subscribed and sworn to before me this 12th day of June, 1926.

RALPH WOODS,
Notary Public in and for the State of Washington,
Residing at Tacoma.

United States of America,
State of Washington,
County of Pierce,—ss.

Clara Jensen, being first duly sworn on oath, deposes and says: That she is the wife of the other surety John P. Jensen; that she has read his foregoing justification, knows the contents thereof and the same is true.

Subscribed and sworn to before me this 12th day of June, 1926.

[Seal] _____.
Notary Public in and for the State of Washington,
Residing at Tacoma.

Clara Jensen could not justify because on a jury trying [3] a murder case. She signed in my presence.

(Sgd.) RALPH WOODS.

[Indorsed]: Approved as to form, amount and sufficiency of sureties.

CARROLL A. GORDON,
Asst. U. S. Atty.

[Indorsed]: Approved June 12, 1926.

T. W. HAMMOND,
U. S. Commissioner.

[Indorsed]: Filed Jun. 14, 1926. [4]

[Title of Court and Cause.]

BAIL BOND OF CHARLES NIELSEN.

KNOW ALL MEN BY THESE PRESENTS, That we, Charles Nielsen, as principal, and Oscar Nielsen and Hazel Nielsen, his wife, as sureties, are held and firmly bound unto the United States of America in the penal sum of Fifteen Hundred (\$1,500.00) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

WITNESS our hands this 14th day of June, 1926.

The condition of the above obligation is such, that whereas an indictment or information has been filed with the Clerk of the above-entitled court, a warrant issued thereon charging the said principal with conspiracy to violate Section 37, P. C. (National Prohibition Act and Revenue Acts), and the said principal has been held to appear and answer for trial.

NOW, THEREFORE, if the said principal shall appear and answer the charge above mentioned on the —— day of June, 1926, and from time to time and from term to term to which the said case may be continued then and there to answer the said charge and shall at all time hold himself amenable to the order and processes of the court and if convicted will appear for judgment and render

himself in execution thereof, then this obligation shall be null and void and of no effect; otherwise [5] to remain and be in full force and effect.

CHARLES NEILSEN,
Principal,
OSCAR NEILSEN,
HAZEL NEILSEN,
Sureties.

United States of America,
State of Washington,—ss.

Oscar Nielsen, being first duly sworn on oath, deposes and says: That he is not an attorney or counsellor at law, sheriff, clerk or officer of any court; that he is a resident of the State of Washington; that he and his wife, Hazel Nielsen, as a community, are the owners of

Diagram 4 1 of the Northeast quarter of the Southeast quarter of Section 23, Township 17 North, Range 3 East, W. M.

that the same is of the value of more than Fifteen Hundred (\$1500.00) Dollars above exempt property; that he and the community are worth more than Fifteen Hundred (\$1500.00) Dollars above exempt property or just debts and liabilities and property exempt from execution.

OSCAR NIELSEN.

Subscribed and sworn to before me this 14th day of June, 1926.

[Seal] RALPH WOODS,
Notary Public in and for the State of Washington,
Residing at Tacoma.

United States of America,
State of Washington,—ss.

Hazel Nielsen, being first duly sworn on oath, deposes and says: That she is the wife of the other surety Oscar Nielsen; that she has read his foregoing justification, knows the contents thereof and the same is true.

HAZEL NIELSEN.

Subscribed and sworn to before me this 14th day of June, 1926.

[Seal] RALPH WOODS,
Notary Public in and for the State of Washington,
Residing at Tacoma. [6]

[Indorsed]: Approved as to form and sufficiency of sureties.

CARROLL A. GORDON,
Asst. U. S. Atty.

[Indorsed]: Filed Jun. 25, 1926. [7]

BAIL BOND OF JAMES CLIFFORD REESE.

5436.

United States of America,
Western District of Washington,
Southern Division.

BE IT REMEMBERED, That on this 11th day of June, A. D. 1926, before me, a United States Commissioner for the said Western District of Washington, Southern Division, personally came James Clifford Reese, principal, and John L. Reese,

a widower, and B. D. Minnick and Margaret Minnick, husband and wife, sureties, and jointly and severally acknowledged themselves to owe the United States of America the sum of One Thousand Five Hundred Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

THE CONDITION of this recognizance is such that if the said James Clifford Reese shall personally appear before the Judge of the United States District Court of Western Washington, Southern Division, holding terms at Tacoma, at and on the first day of the next term of said Court, to wit, the first Tuesday in July, A. D. 1926, being the sixth day of July, A. D. 1926, at 10:00 o'clock A. M. of said day, and from time to time thereafter, to which the case may be continued, then and there to answer the charge of having, on or about the — day of June, 1926, within said District, conspired with others to violate the National Prohibition Act, and conspired to violate sec. 37 of the Penal Code of the United States of America, such conspiracy embracing the one or the other of the National Prohibition Act or Revenue Acts or Laws in existence prior to the passage of the National Prohibition Act, unlawfully and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America, and then and there abide the orders of said Court, and not depart from said District without leave, then this recog-

nizance to be void; [8] otherwise to remain in full force and virtue.

JAMES CLIFFORD REESE. (Seal)

JOHN L. REESE, Sr. (Seal)

B. D. MINNICK. (Seal)

ETTA MARGARET MINNICK, (Seal)

United States of America,
Western Dist. of Washington,
Southern Division,—ss.

John L. Reese, widower, a surety on the annexed recognizance, being duly sworn, deposes and says: That he resides at 733 Market Street, in the City of Tacoma, in said Western District of Washington; that he is a freeholder in the City of Tacoma, Pierce County, Washington and Lewis County, Washington; that he is worth the sum of Thirty Thousand (\$30,000.00) Dollars over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of the Northeast quarter of the Southeast quarter of Section 27, Township 15 North, Range 6 East of the Willamette Meridian; also the West half of Sec. 27, Township 13 North, R. 4 West, W. M., consisting of 320 acres; also the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ Sec. 27, Twp. 13, R. 4 W., W. M., and S./2 of N. E. $\frac{1}{4}$, Sec. 27, Tp. 13, R. 4. W., W. M., also S. E./4, Sec. 27, Tp. 13 N., R. 4 West, W. M., all in Lewis County, Washington, except first 80 acres in Pierce County, Washington, and first 80 acres improved property and the 600 acres Lewis County timber land.

JOHN L. REESE, Sr.

Subscribed and sworn to before me this 11th day of June, 1926.

[Seal] P. L. PENDLETON,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Form approved.

CARROLL A. GORDON,
Asst. U. S. Atty.

United States of America,
Western Dist. of Wash.,
Southern Division—ss.

B. D. Minnick and Margaret Minnick, his wife, sureties on the annexed recognizance, being duly sworn, depose and say: They are husband and wife and residents of Tacoma, Washington, residing at 913½ Commerce Street; that they are freeholders in Western Dist. of Washington and are, as a community worth the sum of Six Thousand Dollars and more, over and above all their just debts and liabilities, in property subject to execution and sale, and that their property consists of: Beg. at S. W. Cor. Sec. 5, A. C. pt. West cor. 13.40 feet So. of Cor. R. D. Lot 3, then along N. E. line to West side of Dairy Co. dist. 78 feet, east 340 feet; thence So. [9] 78 feet W. 480 feet to place beginning, improved property, value more than \$6,000.00.

B. D. MINNICK.

ETTA MARGARET MINNICK.

Subscribed and sworn to before me June 11, 1926.

[Seal]

P. L. PENDLETON,
Notary Public, Tacoma, Wash.

[Indorsed]: Approved June 11, 1926.

T. W. HAMMOND,

U. S. Commissioner.

[Indorsed]: Filed June 12, 1926. [10]

[Title of Court and Cause.]

PRAECIPE FOR SUPPLEMENTAL TRANSCRIPT OF RECORD ON WRIT OF ERROR.

To the Clerk of the United States District Court
for the Western District of Washington,
Southern Division.

You will please prepare and certify and authenticate copies of the following instruments on file in your office:

Bail Bond of Dave Nielsen.

Bail Bond of Charles Nielsen.

Bail Bond of James E. Reese.

This Praecipe.

—the same to be furnished as a supplemental transcript of record in the prosecution of writ of error to the United States Circuit Court of Appeals for the Ninth Circuit.

LLOYD & CROTEAU,

FRANK S. CARROLL,

Attorneys for Defendants,

Office and P. O. Address:

140 Perkins Building, Tacoma, Washington.

[Indorsed]: Filed Dec. 11, 1926. [11]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO SUPPLEMENTAL TRAN-
SCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing and attached is a full, true and correct transcript of so much of the record and proceedings in the case of United States of America, Plaintiff, *versus* Dave Nielsen, Charles Nielsen, James Clifford Reese and Noland Nelson, Defendants, Cause No. 5436, in said District Court, as required by supplemental praecipe of counsel filed and shown herein and as the originals appear and of record in my office at Tacoma in said District.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office on behalf of the plaintiffs in error for making the supplementary record and certificate to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's Fees (Act. Feb. 11, 1925) for making record and return 22 fols. @ 15¢ each....\$3.30
Clerk's Certificate50

ATTEST my hand and the seal of said District Court at Tacoma, in said District, this 11th day of December, A. D. 1926.

[Seal]

ED. M. LAKIN,
Clerk.

By Alice Huggins,
Deputy. [12]

[Endorsed]: No. 5021. United States Circuit Court of Appeals for the Ninth Circuit. Dave Nielson, Charles Nielson and James E. Reese, Plaintiffs in Error, vs. United States of America, Defendant in Error. Supplemental Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed December 13, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the
United States Circuit Court
of Appeals
For the Ninth Circuit

No. 5456 **5021**

DAVE NIELSEN, CHARLES NIELSEN and JAMES E.
REECE,

Plaintiffs in Error

VS.

UNITED STATES OF AMERICA,

Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DIS-
TRICT COURT OF THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

HON. E. E. CUSHMAN, District Judge

Brief of Plaintiffs in Error

LLOYD & CROTEAU

Attorneys for Plaintiff in Error Dave Nielsen
140 Perkins Building, Tacoma, Washington

STUART H. ELLIOTT

Attorney for Plaintiffs in Error Charles Nielsen
and James E. Reece
Pacific Savings Building, Tacoma, Washington

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 5436

DAVE NIELSEN, CHARLES NIELSEN and JAMES E.
REECE,

Plaintiffs in Error

VS.

UNITED STATES OF AMERICA,

Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DIS-
TRICT COURT OF THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

HON. E. E. CUSHMAN, District Judge

Brief of Plaintiffs in Error

STATEMENT OF THE CASE

About the 18th of May, 1926, along the bank of the upper Nisqually river, prohibition officers Croxall and Lambert, together with Deputy Sheriff Paul Jeffery and Theodore Mohrbacher, discovered a still.

In connection with the still there was discovered a large mash vat containing mash in a high state of fermentation, a number of empty kegs, and barrels containing some whiskey, but not filled. Adjacent to this still, which was in operation, and which had apparently been in operation for some time, there was found a considerable quantity of sacked granulated white sugar, commonly known as "sea island sugar."

About a thousand feet from where the still, mash vat and the paraphernalia incident to distilling operations were located, and at the head of the general trail leading to the road from the river, and the still as well, was an abandoned logging camp where were situated a number of small houses and a barn, which was used as a garage; and there, in the garage, were found three automobiles. There was the Buick touring car belonging to the defendant Dave Nielsen, a Chevrolet coupe belonging to the defendant Charles Nielsen and a Ford touring car belonging to the defendant James E. Reese. All of these cars were together. The back seats of the two touring cars had been removed and were in the houses, where they were being used as seats. The officers thereupon proceeded to search without warrant, and did search without warrant, one of the cabins, being

the cabin occupied by a man named Noland Nelson, who was afterward indicted as a defendant in this case, but the indictment against him was subsequently nolled at the opening of the trial. In this house, which was the residence of Noland Nelson, was found a small quantity of whiskey in a pint bottle in a pasteboard box covered with clothing and personal effects. This was taken by the officers making the search. (Tr., p. 55.)

After being indicted, Noland Nelson petitioned the court to suppress this whiskey as evidence in the case. (Tr., pp. 6 and 7.)

It appeared on the part of the Government, in its attempt to sustain the validity of the search, by the testimony of one Mark Y. Croxall, a prohibition agent, that the search was made under his direction by deputy sheriffs of Pierce County, who then and there found the whiskey (Tr., p. 28), and upon that showing the District Court made an order denying the petition to suppress (Tr., p. 28). It may be remarked here that in the trial of the case this same officer, Mark Y. Croxall, in testifying for the Government in chief, testified that it was not the deputy sheriffs who discovered the liquor, but Lambert, another prohibition officer, acting in his capacity as such. (Tr., p. 34.)

The defendants Dave Nielsen, Charles Nielsen and James E. Reese were, after the indictment was dismissed as to Noland Nelson, called to the bar of the court on the 25th day of June, 1926, and were placed on trial before a jury.

Mark Y. Croxall was called as the first witness for the Government. He described the conditions surrounding the still and testified that no men were seen or identified, and undertook to testify as follows with reference to Exhibit No. 3 of the Government, which is a bottle of whiskey having been found in Noland Nelson's cabin:

"We entered Nelson's house.

Q. (By defendants' counsel) : Did you have a warrant for that?

MR. GORDON (For the Government) : Objected to as immaterial.

THE COURT: Objection sustained.

MR. WOODS (Defendants' counsel) : Exception.

WITNESS (continuing) : The bottle of whiskey was found in Nelson's cabin on the bed." (Tr., p. 42.)

The same witness testified further as follows:

"Calling my attention to Government's Exhibit No. 3, for identification, that is a part of a pint of liquor that was found in the cabin. It has the same flavor and the same taste as that found at the still. The flavor is distinc-

tive. I recognize the flavor and taste of the whiskey found at the still and that in this bottle marked Government's Exhibit 3 for identification, as having been tasted by me before. It has a peculiar flavor. I do not know how I would describe it, any more than I know the difference in flavors of anything I taste. I had tasted it twice before near the Oscar Nielsen place. * * * Oscar Nielsen is a brother of Dave Nielsen. * * * I do not know whether Dave was living at the Oscar Nielsen place at the time or not. I know that I arrested him there.

MR. WOODS (For the defendants): I object to that. Do you mean to say you arrested him there on this charge involved in this case?

A: Not in this case. Not in this case; no.

THE COURT: Objection overruled. Was it before this case?

A: Yes.

MR. WOODS: Exception. * * *

WITNESS CONTINUING: Some whiskey was found in the barn on Oscar Nielsen's place. The same party found it at the still where Dave Nielsen was.

Q: Did you find Dave Nielsen at that still?

A: Yes."

Whereupon counsel for the defendant objected and saved his exception.

"WITNESS CONTINUING: Dave Nielsen was running the still.

Q: (District Attorney) Was he afterwards charged with that offense in this court?

A: He was.

Q: What was his plea, if any, to that charge?

A: Plea of guilty.

MR. WOODS: We object to that, and move to strike the answer.

MR. GORDON: This is merely for the purpose of showing that the whiskey that Dave Nielsen admitted two years ago having manufactured was identical in kind, taste and odor with this whiskey that was found in this still on May 18th, 1926, at the place alleged in the indictment."

Thereupon the court overruled the objection and motion, and the defendants, and each of them, saved their exception. (Tr., pp. 34-39.)

The testimony of the Government continuing was to like effect by the other witnesses introduced, all of which tended to show that the defendants, and each of them, owned the respective cars described; and that they were probably in the vicinity along the river at that time; and that they had occupied the cabins or houses where the search was made. It was also shown that there were groceries in the house, as well as fishing tackle and a fishing basket partly filled with corks, which was not identified as belonging to any of the defendants, and a number of sugar sacks about the premises as well. There was also found a sack full of copper clippings

similar to the copper from which the still was made, which sack was about 100 feet in the rear of one of the cabins in the brush.

There was also found among the groceries in the house, and as a part of the groceries, a small quantity of white granulated sugar, referred to as "Sea Island Sugar." (Tr., p. 54.)

It was also discovered that a part of the mash in the distillery vat consisted of white corn meal. (Tr., p. 31.) This mash, which takes from three to seven days' setting to ferment, according to the temperature and conditions, was in a high state of fermentation. (Tr., p. 31.)

There was also found in the coupe of Charles Nielsen some pulverized grains of corn meal. There was also found on the floor of the Ford touring car belonging to Reece a small quantity of corn meal. Charles Nielsen, however, explained the presence of the corn meal. Reece did likewise. It is a fact that Reece had only purchased his car in Tacoma on the evening of the 15th day of May, or less than 36 hours before the raid upon the still. (Tr., p. 82.)

This was the extent of the testimony, either direct or circumstantial, offered by the Government.

At the close of the Government's testimony the defendants, and each of them, moved the court for

an instructed verdict of dismissal, which motions were all by the court overruled, and exception allowed the defendants. (Tr., p. 63.)

No further testimony was offered by the Government than that herein stated to connect the offense of Dave Nielsen committed two years ago with the defendants in this case; and, at the close of the Government's case, the defendants, and each of them, moved the court to strike the testimony of Mark Y. Croxall and to withdraw it from the consideration of the jury, which testimony related to the arrest and plea of guilty of Dave Nielsen about two years ago for the manufacture and possession of liquor. This motion was by the court overruled and exception allowed the defendants. (Tr., pp. 63-64.)

Thereupon the defendants Charles Nielsen and James E. Reece in their own behalf testified in substance as follows:

Charles Nielsen testified that he had never been arrested and had voluntarily appeared in the case for trial. That on the day on which the officers discovered the still he was in the vicinity on a fishing trip; and that he had arranged to meet the defendant Reece, who was a timber cruiser; and that he stopped at the cabin the night before; and

that Dave Nielsen came the next morning. That Reece then proceeded on a cruising trip, and that he (Charles Nielsen), with his brother, Dave Nielsen, proceeded on their fishing trip. (Tr., p. 84.)

Reece testified to similar effect. Each of them denied any knowledge of the still or the whiskey, and especially denied any conspiracy to violate the laws of the United States. Numerous character witnesses were offered on the part of the defendants, and each of them.

Counsel for Dave Nielsen called as a witness S. W. Austin, who testified in substance and effect that he was a merchant at Graham and that he had seen Dave Nielsen at work on his farm in the vicinity of Eatonville; and that he (Dave Nielsen) was a married man with a family and a considerable and successful farmer in that vicinity. That he had seen him working on his farm practically every day up to the time the officers discovered this still. (Tr., p. 73.) The witness then identified a paper which was shown him, namely, defendants' Exhibit A-4, for identification, as a bill of goods that he had sold Dave Nielsen on the 17th day of May, the first item on the list being two fishing lines.

Thereupon the following proceedings were had and done in that connection:

"Q: (By defendants' counsel) Did you know about his (Dave Nielsen's) going fishing?

A: Yes. When he was buying fishing tackle he made the remark that he was going fishing.

MR. GORDON: I object to what he said and ask the jury be instructed to disregard it.

THE COURT: Objection sustained. The jury will disregard what was said.

MR. WOODS: (For the defendants) Exception. (Tr., p. 74.)

Dave Nielsen was not sworn and did not testify as a witness in the case.

Defendants were each convicted. They interposed their timely motion for a new trial, which was denied, saving them their exceptions, and sentence was thereupon pronounced by the court.

From that judgment and sentence and the proceedings upon which it is based, this writ of error is prosecuted.

ASSIGNMENT OF ERRORS CLAIMED BY
DAVE NIELSEN

I.

The Court erred in denying the petition of Noland Nelson to suppress evidence, *i. e.*: A small quantity of whiskey found in a shack occupied by said Noland Nelson as his home, which said home was searched without warrant of law. (Pp. 4 and 5, Bill of Exceptions.)

In that connection, the Court further erred in excluding testimony as follows:

MARK Y. CROXALL: (Cross examination) We entered Nelson's house.

Q: Did you have a warrant for that?

MR. GORDON: (District Attorney) Objected to as immaterial.

THE COURT: Objection sustained.

MR. WOODS: Exception.

WITNESS CONTINUING: The bottle of whiskey was found in Nelson's cabin on the bed. (Said bottle of whiskey referred to being marked Government's Exhibit No. 3.) (Pp. 16 and 17, Bill of Exceptions.)

II.

The Court erred in permitting the witness Mark Y. Croxall to testify as follows:

MR. CROXALL: I do not know whether Dave (Nielsen) was living at the Oscar Nelson

place at the time or not. I know I arrested him there.

MR. WOODS: I object to that. Do you mean to say you arrested him there on this charge involved in this case?

A: Not in this case, no.

THE COURT: Objection overruled. Was it before this case?

A: Yes.

THE COURT: Objection overruled.

MR. WOODS: Exception. * * *

MR. WRIGHT: The defendant Reece objects to that evidence as being entirely too remote, and in no way connecting him with it.

THE COURT: Objection will be overruled. * * *

MR. WRIGHT: Exception.

THE COURT: Allowed. (Pp. 10 and 11, Bill of Exceptions.)

The Court further erred in permitting the witness Mark Y. Croxall to testify further as follows:

Q: (By the District Attorney) At the time you have spoken of (referring to an occasion about two or three years ago), when you drank some whiskey that tasted like this near Oscar Nielsen's cabin, where did you find that whiskey?

A: Some whiskey was found in the barn on Oscar Nielsen's place. The same party found it at the still where Dave Nielsen was.

Q: Did you find Dave Nielsen at that still?

A: Yes.

MR. WOODS: We object to that for the further reason that there is no contention of an overt act at that time. The only contention as to an overt act is these set forth in the complaint here made.

THE COURT: You are not confined to overt acts to show the arrest of the defendant Dave Nielsen. Objection overruled.

MR. WOODS: Exception.

Q: What was Dave Nielsen doing apparently at the still at that time two years ago?

A: He was running the still.

Q: Was he afterwards charged with that offense in this court?

A: He was.

Q: What was his plea to that charge?

A: Plea of guilty.

MR. WOODS: We object to that, and move to strike the answer.

THE COURT: Objection overruled.

MR. WOODS: We note an exception.

THE COURT: Exception allowed.

MR. WRIGHT: May it be understood that the objection of the defendant James Reece goes to this evidence as being too remote; and may we have an exception to the ruling?

THE COURT: Exception allowed. (Pp. 12, 13 and 14, Bill of Exceptions.)

III.

The Court erred in admitting Government's Exhibit No. 3.

IV.

The Court erred in overruling the motion of the defendant Dave Nielsen for an instructed verdict at the close of the Government's case. (P. 35, Bill of Exceptions.)

V.

The Court erred in overruling the motion of the defendant Dave Nielsen to strike the testimony of Mark Y. Croxall and to withdraw it from the consideration of the jury, said testimony being all of the testimony relating to the arrest and plea of guilty of Dave Nielsen more than two years ago. (P. 37, Bill of Exceptions.)

VI.

The Court erred in sustaining the objection of the Government and instructing the jury to disregard the following testimony of S. W. Austin:

Q: (By Mr. Woods for the defendants Nielsen) Did you know about his going fishing?

A: Yes. When he was buying fishing tackle he made the remark that he was going fishing.

MR. GORDON: I object to what he said and ask the jury be instructed to disregard it.

THE COURT: Objection sustained. The jury will disregard what was said.

MR. WOODS: Exception.

THE COURT: Exception allowed. (P. 45, Bill of Exceptions.)

VII.

The Court erred in overruling the motion of the defendant Dave Nielsen in arrest of judgment.

VIII.

The Court erred in overruling the motion of the defendant Dave Nielsen for a new trial.

IX.

The Court erred in pronouncing judgment and sentence against the defendant Dave Nielsen.

ASSIGNMENT OF ERRORS CLAIMED BY
CHARLES NIELSEN

I.

The Court erred in denying the petition of Noland Nelson to suppress evidence, *i. e.*, a small quantity of whiskey found in a shack occupied by said Noland Nelson as his home, which said home was searched without warrant of law. (Pp. 4 and 5, Bill of Exceptions.)

In that connection, the Court further erred in excluding testimony as follows:

MARK Y CROXALL: (Cross examination) We entered Nelson's house.

Q: Did you have a warrant for that?

MR. GORDON: (District Attorney) Objected to as immaterial.

THE COURT: Objection sustained.

WITNESS CONTINUING: The bottle of whiskey was found in Nelson's cabin on the bed. (Said bottle of whiskey referred to being marked Government's Exhibit No. 3.) (Pp. 16 and 17, Bill of Exceptions.)

II.

The Court erred in permitting the witness Mark Y. Croxall to testify as follows:

MR. CROXALL: I do not know whether Dave (Nielsen) was living at the Oscar Niel-

sen place at the time or not. I know I arrested him there.

MR. WOODS: I object to that. Do you mean to say you arrested him there on this charge involved in this case?

A: No in this case, no.

THE COURT: Objection overruled. Was it before this case?

A: Yes.

THE COURT: Objection overruled.

MR. WOODS: Exception. * * *

MR. WRIGHT: The defendant Reese objects to that evidence as being entirely too remote, and in no way connecting him with it.

THE COURT: Objection will be overruled. * * *

MR. WRIGHT: Exception.

THE COURT: Allowed. (Pp. 10 and 11, Bill of Exceptions.)

The Court further erred in permitting the witness Mark Y. Croxall to testify further as follows:

Q: (By the District Attorney) At the time you have spoken of, (referring to and occasion about two or three years ago) when you drank some whiskey that tasted like this near Oscar Nielsen's cabin, where did you find that whiskey?

A: Some whiskey was found in the barn on Oscar Nielsen's place. The same party found it at the still where Dave Nielsen was.

Q: Did you find Dave Nielsen at that still?

A: Yes.

MR. WOODS: We object to that for the further reason that there is no contention of an overt act at that time. The only contention as to an overt act is these set forth in the complaint here made.

THE COURT: You are not confined to overt acts to show the arrest of the defendant Dave Nielsen. Objection overruled.

MR. WOODS: Exception.

Q: What was Dave Nielsen doing, apparently, at the still at that time two years ago?

A: He was running the still.

Q: Was he afterwards charged with that offense in this Court?

A: He was.

Q: What was his plea to that charge?

A: Plea of guilty.

MR. WOODS: We object to that, and move to strike the answer.

THE COURT: Objection overruled.

MR. WOODS: We note an exception.

THE COURT: Exception allowed.

MR. WRIGHT: May it be understood that the objection of the defendant James Reese goes to this evidence as being too remote; and may we have an exception to the ruling?

THE COURT: Exception allowed. (Pp. 12, 13 and 14, Bill of Exceptions.)

III.

The Court erred in admitting Government's Exhibit No. 3.

IV.

The Court erred in overruling the motion of the defendant Charles Nielsen for an instructed verdict at the close of the Government's case. (P. 35, Bill of Exceptions.)

V.

The Court erred in overruling the motion of the defendant Charles Nielsen to strike the testimony of Mark Y. Croxall and to withdraw it from the consideration of the jury, said testimony being all of the testimony relating to the arrest and plea of guilty of Dave Nielsen more than two years ago. (P. 37, Bill of Exceptions.)

VI.

The Court erred in sustaining the objection of the Government and instructing the jury to disregard the following testimony of S. W. Austin:

Q: (By Mr. Woods for the defendants Nielsen) Did you know about his going fishing?

A: Yes. When he was buying fishing tackle he made the remark that he was going fishing.

MR. GORDON: I object to what he said and ask the jury be instructed to disregard it.

THE COURT: Objection sustained. The jury will disregard what was said.

MR. WOODS: Exception.

THE COURT: Exception allowed. (P. 45, Bill of Exceptions.)

VII.

The Court erred in overruling the motion of the defendant Charles Nielsen in arrest of judgment.

VIII.

The Court erred in overruling the motion of the defendant Charles Nielsen for a new trial.

IX.

The Court erred in pronouncing judgment and sentence against the defendant Charles Nielsen.

ASSIGNMENT OF ERRORS CLAIMED BY
JAMES E. REESE

I.

The Court erred in denying the petition of Noland Nelson to suppress evidence, *i. e.*, a small quantity of whiskey found in a shack occupied by said Noland Nelson as his home, which said home was searched without warrant of law. (Pp. 4 and 5, Bill of Exceptions.)

In that connection, the Court further erred in excluding testimony as follows:

MARK X. CROXALL: (Cross examination) We entered Nelson's house.

Q: Did you have a warrant for that?

MR. GORDON: (District attorney) Objected to as immaterial.

THE COURT: Objection sustained.

MR. WOODS: Exception.

WITNESS CONTINUING: The bottle of whiskey was found in Nelson's cabin on the bed. (Said bottle of whiskey referred to being marked Government's Exhibit No. 3.) (Pp. 16 and 17, Bill of Exceptions.)

II.

The Court erred in placing the defendant James E. Reese upon trial without arraignment or plea to the Indictment.

III.

The Court erred in permitting the witness Mark Y. Croxall to testify as follows:

MR. CROXALL: I do not know whether Dave (Nielsen) was living at the Oscar Nielsen place at the time or not. I know I arrested him there.

MR. WOODS: I object to that. Do you mean to say you arrested him there on this charge involved in this case?

A: Not in this case, no.

THE COURT: Objection overruled. Was it before this case?

A: Yes.

THE COURT: Objection overruled.

MR. WOODS: Exception. * * *

MR. WRIGHT: The defendant Reese objects to that evidence as being entirely too remote, and in no way connecting him with it.

THE COURT: Objection will be overruled. * * *

MR. WRIGHT: Exception.

THE COURT: Allowed. (Pp. 10 and 11, Bill of Exceptions.)

The Court further erred in permitting the witness Mark Y. Croxall to testify further as follows:

Q: (By the District Attorney) At the time you have spoken of, (referring to an occasion about two or three years ago) when

you drank some whiskey that tasted like this near Oscar Nielsen's cabin, where did you find that whiskey?

A: Some whiskey was found in the barn on Oscar Nielsen's place. The same party found it at the still where Dave Nielsen was.

Q: Did you find Dave Nielsen at that still?

A: Yes.

MR. WOODS: We object to that for the further reason that there is no contention of an overt act at that time. The only contention as to an overt act is these set forth in the complaint here made.

THE COURT: You are not confined to overt acts to show the arrest of the defendant Dave Nielsen. Objection overruled.

MR. WOODS: Exception.

Q: What was Dave Nielsen doing, apparently, at the still at that time two years ago?

A: He was running the still.

Q: Was he afterwards charged with that offense in this Court?

A: He was.

Q: What was his plea to that charge?

A: Plea of guilty.

MR. WOODS: We object to that, and move to strike the answer.

THE COURT: Objection overruled.

MR. WOODS: We note an exception.

THE COURT: Exception allowed.

MR. WRIGHT: May it be understood that the objection of the defendant James Reese goes to this evidence as being too remote; and may we have an exception to the ruling?

THE COURT: Exception allowed. (Pp. 12, 13 and 14, Bill of Exceptions.)

IV.

The Court erred in admitting Government's Exhibit No. 3.

V.

The Court erred in overruling the motion of the defendant James E. Reese to strike the testimony of Mark Y. Croxall and to withdraw it from the consideration of the jury, said testimony being all of the testimony relating to the arrest and plea of guilty of Dave Nielsen more than two years ago. (P. 37, Bill of Exceptions.)

VI.

The Court erred in overruling the motion of the defendant Reese, at the close of all of the Government's testimony, to dismiss. (Pp. 37 and 38, Bill of Exceptions.)

VII.

The Court erred in overruling the motion of the defendant James E. Reese in arrest of judgment.

VIII.

The Court erred in overruling the motion of the defendant James E. Reese for a new trial.

IX.

The Court erred in pronouncing judgment and sentence against the defendant James E. Reese.

ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR DAVE NIELSEN

Under his claim or error, the plaintiff in error Dave Nielsen will argue what he claims to be the errors of the trial court under three general heads, within which all of the claimed errors, except the insufficiency of the evidence to justify the verdict, naturally and logically fall and which it might be well to restate, for the purpose of clarity, as follows:

First. The error of the trial court in admitting all evidence concerning the bottle of whiskey which was found in the home of Noland Nelson. Under this general classification will naturally fall Assignments 1 and 3, and Assignment 2 will be closely co-related therewith.

Second. The error of the trial court in permitting evidence to go to the jury touching the arrest

and plea of guilty of Dave Nielsen two years before. Under this general head will fall Assignments of Error 2, 4 and 5.

Third. The error of the trial court in refusing to permit the witness Austin to testify on behalf of Dave Nielsen as to his expressed purpose at the time he bought the fishing tackle on the day before he was present in the general locality of the still. Under this general head will fall Assignment of Error number 6. Assignment of Error number 8, of course, which charges error in the refusal of the court to grant a new trial, need not be separately discussed.

UNLAWFUL SEARCH AND SEIZURE

Prohibition Officer Croxall was in charge of the raiding party which entered the cabin or home of Noland Nelson, and there discovered and later produced in evidence a bottle of whiskey marked Government's Exhibit No. 3. (Tr., p. 34.)

Noland Nelson, who was a co-defendant of the plaintiffs in error, was jointly indicted with them. He petitioned the court to suppress the evidence obtained in what he conceived to be an unlawful search. The reason for the trial court's ruling does not appear in the record, but if counsel for plaintiffs in error are correctly informed, it was based

upon the fact that it appeared that the actual entry and seizure was made by State officers, namely, three deputy sheriffs of Pierce County; and that no actual unlawful search was made by the Government officers; and that, therefore, the court was without authority to discipline the State officers. In any event, whether such reason for the ruling appears or not, that is the only theory, as we view the law and the facts pertinent in this case, upon which the trial court could have justified the search of the home of Noland Nelson, assuming it could be justified at all. That the search was in fact actually made by officers of the United States, subject to the discipline of the District Court, appears by the testimony of Mark Y. Croxall himself. The substance of his testimony follows:

"That on the 18th day of May, 1926, in company with three deputy sheriffs for Pierce County, without warrant he (witness) went to the residence of the defendant Noland Nelson, and that there said deputy sheriffs for Pierce County, acting at the direction of the witness, an officer of the United States Government, searched said premises and there found the evidence sought to be suppressed."
(Tr. p. 28.)

A great number of cases might be cited to sustain the position of the plaintiffs in error that the

trial court erred in his view of the law, and that the fruits of the unlawful search upon the petition of Noland Nelson should have been suppressed. One of the leading cases in recent years is the case of *Week v. United States*, 232 U. S. 383; 58 L. Ed. 52, decided by the Supreme Court in 1914. Without trespassing upon the time of the court to review the reasons advanced in this case, as well as in earlier cases, which reasons of course are familiar to this court, we desire to point out that in the Weeks case, especially, the search was actually made in the first instance by police officers of Kansas City, and later on the search was completed by police officers acting under the direction of a United States Marshal. The facts, therefore, were very similar to those in the case at bar.

The court in no uncertain terms held that, inasmuch as officers of the United States Government were party to the violation of the constitutional rights of the defendant, they became subject to the discipline of the Federal courts and the evidence secured was thereby rendered incompetent.

Cases may be found which hold that where the search is made by State or City officers, the mere presence of a Federal officer will not invalidate the search where such search was not made under his direction. But no case may be found which goes

further than that. In the case at bar, it will be observed by the testimony of Croxall himself, who was the Federal officer in charge of the search:

"That said sheriffs for Pierce County, acting at the direction of the witness, an officer of the United States Government, searched said premises and there found" * * * (Tr., p. 28.)

It follows, of course, without citation of authority, that if the State officers were acting under the direction or at the direction of the Federal officer, the Federal officer was in charge of the search and in control of the search, and that the search was his search. Plain and ordinary rules of agency would require this view and no other.

But, we do not stop there, for the case must be considered in its entirety; and it appears that when this witness Croxall was called on the Government's case in chief, the motion to suppress having been happily disposed of, he was equally explicit in his statement that the search was made and the liquor discovered by Richard A. Lambert, who led the party into the cabin and made the search and actually discovered the liquor, and that Richard A. Lambert was a Federal prohibition agent. (Tr., p. 34.) That, of course, was not before the trial court at the time he passed upon the petition to suppress, but it was before the court when the interrogatory

was propounded to Croxall as to whether or not he had a search warrant for the entry of the premises, and the trial court sustained the objection of the District Attorney upon the stated ground of immateriality. (Tr., p. 42.)

The argument will probably be made on behalf of the Government that the right to suppress evidence unlawfully obtained is a right personal to the defendant whose home or rights have been invaded. This we concede to be the general rule, but it must be remembered that this is a conspiracy case, that the three plaintiffs in error and Noland Nelson were all facing trial upon the same indictment, and that Noland Nelson did avail himself of his right by his application timely made to suppress the evidence unlawfully obtained.

Briefing counsel were not trial counsel in that case, but we may assume from the practice of counsel, as we know it to be usually followed in like cases, that counsel for all of the defendants were in accord; and that the petition was filed at the particular instance of Noland Nelson because Noland Nelson, as the regular occupant of the house, was perhaps better fitted to claim that right than the transient occupants, Reece and Nielsen. However, any of them might have successfully prosecuted his petition to suppress upon the same

grounds, and the decision would doubtless have been the same. The ruling was made and the defendants reserved their exceptions to that ruling and perfected their record thereby. They relied upon the claim of error that had been preserved by Noland Nelson, and it was not until after they had been called to the bar of the court for trial and their time for filing such a petition on their own behalf had expired by the calling of the jury, that the Government saw fit to attempt to cure what apparently was the error of the trial court, by dismissing as against Noland Nelson, whose claim of error was then complete.

But, we go further in our claim than this. We urge that this error was complete when the court's ruling was made; that the search in the first instance having been unlawful, the evidence became wholly incompetent when Noland Nelson invoked the constitutional guaranty and petitioned for the suppression of the evidence. That evidence, then, we claim, became dead, it having been unlawfully obtained, when Noland Nelson, being a defendant and claiming his rights as a defendant, invoked the constitutional guaranty; and, thenceforth, it was the duty of the court to exclude and suppress the articles found for all purposes. This was a conspiracy case, and what affected one defendant af-

fected all; and, if error had been committed, as we contend, by the trial court, and if such error affected, as it certainly would, each and all of the defendants, we submit that no subsequent act of the District Attorney by his manipulation of pleas could make the record wholesome.

Conceding, as we do, the wide latitude allowed in the introduction of proof in conspiracy cases, this evidence upon the filing of the petition was rendered incompetent and nothing subsequently could happen to restore its competency, and no rule may be found in any case which admits incompetent evidence. The prejudice resulting from the introduction of that evidence will more clearly appear as we proceed to the argument under the next general assignment.

UNWARRANTED PROOF OF DISCONNECTED CRIMES OR OTHER OFFENSES

Dave Nielsen did not take the stand. That he would not take the stand was apparently surmised by the District Attorney and the prohibition officers, as the Government proceeded to make its case in chief. There was no direct evidence connecting or tending to connect any of the defendants with the crime charged. The Government must rely upon circumstantial evidence, as we have pointed

out in the Statement. This circumstantial evidence was weak in the extreme, giving rise, as it must have given rise, to the belief in the minds of the prosecutors that a jury could scarcely arrive at the conclusion that all of the facts claimed—admitting them to be facts—were inconsistent with the reasonable hypothesis that the defendants were, as many other men were at that season of the year, embarked upon their lawful pursuits—in the one instance, as sportsmen fishing the stream; and in the other as cruising a tract of nearby timber. It became necessary, then, for the Government to link up this simple expedition with something sinister that would tend to convince the jury that the venture was a criminal one and not a lawful one. To do so by the introduction of relevant evidence seemed impossible.

Dave Nielsen, years before, had made some liquor. He had been apprehended and had frankly pleaded guilty and paid the full penalty for that unfortunate venture. If it could be brought to the knowledge of the jury that one of the three men charged, namely, Dave Nielsen, had theretofore been convicted, the inference would follow that he was a known distiller; and inference might be drawn from inference that he was engaged in that avocation at this place fifty miles from his home.

Of course, this evidence could not be relevant under the well-settled rules in like cases. It has been many times decided that disconnected offenses, even of similar nature, or even in conspiracy cases, are irrelevant and may not be introduced in evidence.

One of the leading cases among the many which might be cited is the well considered case of *Miller et al. v. United States*, 133 Fed. 337. Particular attention of the court is called to the discussion on pages 353 and 354 of that Opinion, wherein precisely the same question is discussed as would be involved in the instant case if the Government had attempted to introduce evidence of that prior offense without resort to subterfuge.

In a recent case decided in August, 1926, that of *Mercer v. United States*, 14 Fed. (Second) 281, which seems to be directly in point in the present case, it is said that in a prosecution for conspiracy and use of the mails to defraud through sale of corporate stock, where the defendant did not testify, it was error to permit the prosecuting attorney by questions asked witnesses to disclose prior conviction of the defendant for forgery and fraud.

Other recent cases which establish this well known rule of evidence is that of *Grantello v. United States*, 3 Fed. (Second) 117; *Crowley v.*

United States, 8 Fed. (Second) 118; *Wansbach v. United States*, 11 Fed. (Second) 221; and *Cucchia, et al. v. United States*, 19 Fed. (Second) 86.

The district attorney doubtless realized the application of the rule of law indicated by these cases, for he made no attempt to prove the disconnected offense except by the subterfuge which we shall presently discuss. But rules of law and evidence are of small moment where professional witnesses, skilled in court procedure, are willing to furnish a connecting link, based upon truth or falsehood, to connect up those things which otherwise are disassociated.

In order to make relevant this prior offense, which otherwise would have been irrelevant under the authorities, the Government called upon this same Mark Y. Croxall, to whom we have heretofore referred, who, in the hearing upon the application to suppress testimony, undertook to make the testimony competent by showing that the search was made and the discovery made by deputy sheriffs, and who, upon being called as a witness in the case in chief, finding that the momentary exigencies of his case seemed to require it, was equally willing to and did testify that the entry was made and the search was made by the Government agents. Croxall then undertook to testify that when he tasted the

liquor, which was found in the bottle in Noland Nelson's house, he recognized the fact that it had a peculiar flavor. His delicate senses were so attuned that he not only knew that it was the same liquor that came from the still a thousand feet away, but he knew as well that it tasted the same as some liquor that he had tasted two years or more before at a time when he arrested Dave Nielsen, who then pleaded guilty to manufacture and possession at a point some 55 miles away. The ostensible force of this testimony, if believed, of course, was to carry conviction that the whiskey in the bottle in the cabin occupied by all four defendants was whiskey which came from the still a thousand feet away; and, furthermore, it was Dave Nielsen's whiskey or whiskey which Dave Nielsen had retained from his stock of two years before—in any event, that it was Dave Nielsen's whiskey, recognized as such by its peculiar flavor, but its real purpose was to apprise the jury that Dave Nielsen had suffered a prior conviction. The plaintiffs in error argue that this testimony by Croxall, already shown by the record to be a witness careless of the truth, was so apparently a subterfuge and a sham that the trial court should have so ruled.

Let us examine this incredible testimony of Croxall in the light of reason to ascertain whether

or not it is a vehicle upon which the otherwise irrelevant testimony could have been transported into the case. In the first place, if the records of the District Court and this court import verity, not only hundreds, but thousands of amateur distillers have placed their various brands and kinds of liquor upon the market in Western Washington, and within a radius of less than 50 miles from the place where Croxall's delicate senses were first assailed by the peculiar flavor of the whiskey he tasted two years before. In the second place, Croxall, even assuming that he undertook to testify as an expert, does not pretend that he had tasted all of the brands or substantially all of the brands of whiskey made in that locality, and, unless he had, he certainly could not be in a position to undertake to say that the peculiarity of the flavor of this liquor was identifiable with the defendant Dave Nielsen, and the most he undertakes to say is that the whiskey had a peculiar flavor.

It may not be amiss to say that the writers of this brief, basing their statement upon personal knowledge as well as hearsay, are prepared to assert that all of this Western Washington moonshine has a peculiar flavor.

The point we make, however, is that Croxall by his testimony was a prohibition agent and it was

a part of his business to taste and test liquor for alcoholic content. He had been engaged in that business for many years. Presumably, he had tasted thousands of brands of liquor, and presumably when Dave Nielsen pleaded guilty two years before to the manufacture and possession of liquor, the case against him was closed and forgotten. It is hardly to be assumed that the taste of that whiskey lingered in the memory of the prohibition agent; and it seems incredible that two years after, upon the banks of the Nisqually River, 50 miles away, the flavor and aroma of this whiskey found in a partly empty pint bottle in a paper carton covered by old clothes and personal effects, should have carried his memory back over an uncharted course through his thousands of experiences, to his early love of two years before. The statement rapes reason and challenges human credulity; and we submit that it bears upon its face the prints and marks of falsehood and may not be taken for exactly other than what it is—a pretense and a subterfuge whereby the witness undertook to make relevant what the law has declared irrelevant.

Even assuming that Dave Nielsen had made the whiskey, which was found in the bottle in the cabin, it is almost impossible to believe that it would have had the same flavor as whiskey made by him two

years before. To have, it would necessarily, of course, require—if we may notice the natural phenomena surrounding such things—that it was made under exactly the same physical conditions, with exactly the same physical ingredients, with the same water, under the same temperature, with the same kind of paraphernalia, and was exactly the same in age and maturity. We submit in all sincerity that it was the duty of the trial court to use ordinary human intelligence to determine whether or not this testimony of Croxall was a subterfuge and a sham; and, if it was, to refuse to permit it to carry into the case the very damaging and prejudicial testimony that Dave Nielsen, the alleged co-conspirator of Reece and Charles Nielsen, had theretofore been convicted or pleaded guilty in effect to identically the same offense as that with which he was here charged.

In the first instance, when this testimony was offered, the trial court appears to have permitted its introduction upon the theory that he did not know what testimony might be introduced to connect up these alleged conspirators with those to the grand jury unknown. It was upon that theory alone that he first admitted the testimony. (Tr., p. 36.)

However that may be, whether the trial court erred in that regard or not, we respectfully submit that when no further effort was made to connect the prior offense of Dave Nielsen with the case at bar, and the defendants at the close of the Government's case moved, as they did, to strike that testimony and to remove it from the consideration of the jury, it became the plain duty of the District Court to so order and so instruct, and in failing to do we submit the District Court committed prejudicial error.

REFUSAL OF COURT TO RECEIVE STATEMENTS EX-
PLANATORY OF ACTS

Under this third general head, the plaintiffs in error will discuss assignment of error No. 8.

S. W. Austin, it will be remembered, was a general merchant in the town of Graham, the trading center adjacent to the farm of Dave Nielsen. On the evening of the 17th day of May, that is, the night before the morning on which the officers went to the scene of the still and discovered the still on the upper Nisqually River, as well as the night before the morning when Dave Nielsen went to that general location on his fishing trip, as he claims, it appeared that Dave Nielsen purchased from Austin two fishing lines,—this on the eve of his departure.

Austin was then asked if he knew about his (Dave Nielsen's) going fishing. He replied that he did, that Nielsen had said, when he bought the fishing lines, that he was going fishing in the morning. This testimony the District Attorney moved be stricken and taken from the consideration of the jury, which motion, over the objection of the defendants, the court granted, and the jury was thereupon instructed accordingly. In this, we claim, lies error. The court presumably struck the testimony upon the theory that it was hearsay and self-serving in its nature.

The general rule of law is perhaps best stated by Mr. Wigmore in his work on Evidence, Vol. 1, p. 34, in which it is said:

"The second axiom, on which our law of evidence rests, is this: *All facts, having rational probative value, are admissible, unless some specific rule forbids.* It has been otherwise expressed as follows by Professor James Bradley Thayer, 'Presumptions and the Law of Evidence,' 3 Harvard Law Review 143: 'There is another precept which it is convenient to lay down as a preliminary one in stating the law of evidence, viz., that, unless excluded by some rule or principle of law, all that is logically probative is admissible. This general admissibility of what is logically probative is not, like the former precept, a necessary presupposition in a rational system of evidence, * * * but yet * * * it is important to notice this also as being a fundamental proposition. In a

historical sense, it has not been the fundamental rule to which the various exclusions were exceptions * * * (But) the main propositions which I have stated should, in the order of thought, be first laid down and always kept in mind.'

"This axiom expresses the truth that legal proof, though it has peculiar rules of its own, does not intend to vary without cause from what is generally accepted in the rational process of life; and that of such variations some vindication may, in theory, always be demanded. In other words, in the system of evidence the rules of exclusion are, in their ultimate relation, rules of exception to a general admissibility of all that is rational and probative."

That the defendant Dave Nielsen said, when he bought the fishing lines on the eve preceding his discovery near the still, that he was going fishing as explanatory of his intent and purpose in going to that locality, is, of course, rationally of probative value. It tends to explain and does explain to the rational mind, bent upon inquiry, his purpose in visiting the scene or locality where his automobile was found and where he doubtless was earlier in the day. It is, then, under the general rule, unless it falls within one of the well defined exceptions which the law has created to exclude it. Those exceptions are, in so far as they are pertinent to this inquiry, that it is hearsay and that it is self-serving. Under the general hearsay rule or exception

it is true that hearsay testimony, so-called, is not admissible; but the exception to the rule or the exception to this general exception is as well founded in the law as the rule or exception itself. This exception rests upon the necessity in certain cases of resorting to hearsay, coupled with the fact that hearsay in such cases is subjected to some sanction and test other than, but deemed equivalent to, the ordinary ones, thereby insuring its trustworthiness, and rendering extremely improbable its falsity. It has induced the law to recognize many exceptions to the rule and to allow the admission of hearsay as competent evidence thereunder.

Encyclopaedia of Evidence, Vol. 6, p. 446.

It is generally held that declarations which are so intimately connected with the principal fact or transaction as to constitute a part of it and to characterize and explain it are admissible as a part of the *res gestae*. The rule, as we have said, is well settled and the difficulty lies not so much in a declaration of the principle as in an application of it to each particular case. Those declarations proven by hearsay have sometimes been referred to by authors as “spoken acts” for the reason that the words used in conjunction with the act become a part of the act itself. They are competent under the general rule, unless under the peculiar circum-

stances of the case it may seem likely to the judge that they have been manufactured in advance to support the needs of the declarant.

Did the facts in this case warrant such an inference by the trial judge? We believe not. In the first place, it cannot be disputed and will not be argued, but that the defendant Dave Nielsen purchased the fish lines—and purchased them, too, on the evening before he made his trip to the general locality of the still. This was proven beyond question. For what purpose would a man ordinarily purchase fish lines? They could not be used in connection with distilling operations. They could be used, and likely would be used, by one going fishing. The declaration by the defendant that he was going fishing at that time fell naturally from his lips as a part of the act, and became to that extent his "spoken act".

It is highly improbable that either the purchase of the fish lines or the declaration as to his purpose were a part of a plan prepared in advance to meet a condition which did not then exist, namely, an explanation to be furnished to the arresting officers or the court that might be called upon to try his case. It must be remembered that at the time the declaration was made no arrest had been made, no search, so far as Dave Nielsen knew, was in pro-

gress or contemplated, no officers were in the vicinity or expected to be, otherwise it logically follows the defendant would not have been in that locality at or near that time.

Suppose, if we may, a parallel case, not connected with the violation of a liquor law, where the rule may be laid down without the prejudice usually incident to the trial of liquor cases. A man is found dead along the railroad track. His representative sues for his wrongful death, claiming that he was a passenger upon the railway train, and that by reason of some defect of appliance or want of care deceased was thrown from the train and death ensued. No other evidence might be available as to whether or not he was actually a passenger upon that train. It would not be argued, we venture, that his widow would be denied the right to testify that shortly before the departure of the train he came home, packed his bag and said he was embarking on that particular train for a given destination. That would be, in the words of the authorities, the "spoken act," explanatory of his other conduct proven by the observers, a part of the *res gestae* and therefore competent under the general exception to the exception to the rule.

It may seem that this assignment of error is of minor importance, but it must be remembered that

the facts and circumstances in this case, upon which the Government relied for a conviction, excluding the unfair inference that might and probably was drawn from the testimony touching Dave Nielsen's plea of guilty two years before, were weak in the extreme; and, aside from the wrongful admission of exclusion of evidence, prejudice is presumed.

We earnestly but respectfully submit that this explanation, if the jury had not been cautioned against its reception, might have in the instant case served to carry conviction of a lawful instead of an unlawful purpose on the part of Dave Nielsen in visiting the locality.

The fourth assignment of error of this plaintiff in error, namely, that the court erred in overruling the motion of the defendant Dave Nielsen for an instructed verdict at the close of the Government's case, we submit becomes manifest upon the reading of the bill of exceptions; and that the question became a question of law for the court and not a question of fact for the jury under the well established rules of law applicable thereto.

Without further discussion of this assignment of error, the plaintiff in error Dave Nielsen will and does adopt the argument addressed to the court by his co-plaintiffs in error, Charles Nielsen and James E. Reece, upon this subject.

ARGUMENT ON BEHALF OF CHARLES NIELSEN and JAMES E. REECE

The plaintiffs in error Charles Nielsen and James E. Reece adopt without repetition the argument thus far advanced on behalf of their co-plaintiff in error, Dave Nielsen.

In that connection these plaintiffs in error further urge that these plaintiffs in error were co-defendants with the defendant Dave Nielsen; and that the admission, if it was wrongful as to Dave Nielsen, of Government's Exhibit No. 3, being the bottle of whiskey found in the cabin unlawfully searched, was equally damaging or more damaging to the cause of these plaintiffs in error than it was to the cause of Dave Nielsen himself. These plaintiffs in error urge in that conenction that they stood before the court and jury without previous record. Their sins, if any they had committed, consisted wholly in being in the vicinity with and associated with Dave Nielsen. If it was wrongfully proven that the liquor was the product of the still of Dave Nielsen, that wrong reflected itself in the verdict against these plaintiffs in error. If it was wrongfully proven that Dave Nielsen had suffered a conviction for exactly the same offense for which he now stood trial, that error reflected itself in the trial of these plaintiffs in error. They were

charged with conspiracy with Dave Nielsen and whatever was wrongfully introduced tending to blacken the character of Dave Nielsen in the eyes of the jury, would be doubly harmful and doubtless was doubly harmful to the cause of these plaintiffs in error.

These plaintiffs in error desire to urge on their own behalf assignment of error four, on behalf of Charles Nielsen, and assignment of error six, on behalf of James E. Reece, which assignments are the same though differently numbered, namely, that the court erred in refusing to sustain the challenge of each of the defendants to the sufficiency of the evidence at the close of the Government's case.

The evidence, as has been remarked before, was purely circumstantial. There was no direct evidence connecting or tending to connect any of the defendants with the distilling operations. Let us review briefly what the evidence on the part of the Government, taking it as a whole, showed. It showed that the automobile of Dave Nielsen, the automobile of Charles Nielsen and the automobile of James E. Reece were practically parked together and all vacant. The logical inference follows, of course, and it was later admitted, that Dave Nielsen, Charles Nielsen and James E. Reece were in that general locality on the morning when the offi-

cers raided the still. It remained then to show for what purpose they were there. Evidence was then introduced to the effect that there was corn meal in the vats at the still; and that the fermentation process had already occupied from three to seven days, according to the temperature and surrounding conditions, so that the corn meal which the officers found at the still had been there for at least a period of three days. Evidence was then introduced to the effect that in the rear of Charles Nielsen's coupe was found a little corn meal; and that in the bottom of the Ford touring car of Reece was found some grains of corn meal. The purpose of that testimony, we assume, on the part of the Government—if that had any probative force at all—was to prove that Charles Nielsen and James E. Reece had, by the use of their cars, transported corn meal to the scene of the distilling operations. This testimony loses its entire force and effect, if it had any in the first place, when it appears, as it does appear, that the automobile of James E. Reece had only been purchased by him on the evening of the 15th day of May. (Tr., p. 82.) That the car had a temporary license plate the Auditor's record shows. It was applied for on the 15th day of May; and he had not had possession of the automobile for over 36 hours, whereas, the corn meal found in the

vats would of necessity have been on the scene from a period of anywhere from three to seven days.

The other circumstances relied upon are these: That an ordinary sugar sack was found under the seat of the car of Charles Nielsen, being described as a sack bearing the brand "Sea Island Sugar". No claim is made that Sea Island Sugar is anything more than a brand, or perhaps a trade name for the larger portion of the white granulated sugar commonly upon the market. There were a number of empty sugar sacks, bearing the same brand, found about the premises, and when the sugar sack in Charles Nielsen's car was placed there or from where it came does not appear.

There is no other circumstance in the entire case which even remotely connected or tended to connect Charles Nielsen or James E. Reece with the operation of the still, saving, of course, their association with Dave Nielsen, against whom was introduced the damaging and unwarranted testimony that he had two years before been engaged in the distilling business. No claim is made that Charles Nielsen or James E. Reece had anything to do with the prior operations of Dave Nielsen or that James E. Reece ever knew or had an opportunity to know of those prior operations, or that he was even acquainted with Dave Nielsen up to that time.

Under this situation, it seems to the writers of this brief that the question as to whether or not the circumstances proven were such as to warrant the court in submitting the case to the jury became for the trial court a question of law.

District Judge Munger in the case of *United States v. Richards*, 149 Fed. 454, has aptly stated the law in the following language:

"Circumstantial evidence to warrant a conviction in a criminal case must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant, or, in other words, the facts proved must all be consistent with and point to his guilt only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proven and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted."

Do the facts, as we have outlined them here and as the record discloses them in this case, meet the test included in that charge? We submit that they do not approach it and that the minds of reasonable men may not differ upon that question; and, if that is true, the District Court should have removed the case from the consideration of the jury and instructed accordingly, and his error in refusing was not cured by any subsequent evidence

elicited from the defendants' witnesses after the ruling was made, as obviously appears from a review of the record.

The errors of which we have here complained on behalf of each and all of the plaintiffs in error, with all due respect to the courts, we are constrained to say would not have occurred in any case except a case arising under the National Prohibition Act. It seems to us that there is a tendency on the part of trial courts to relax the rules of ancient usage and to lightly pass over constitutional rights made for the benefit of the prisoner at the bar where the question is one of liquor violation. Whether we be correct or not in our sincere belief in that respect, we earnestly urge that the well established laws and rules that protect the rights of the perpetrator of fraud whose gainful occupation is to rob the widow and orphan should not be denied the citizen who is charged with a violation of the laws under the 18th Amendment. His rights should receive the same respect and the same consideration as the rights of the more hardened and more dangerous criminal.

Mr. Justice Reynolds of the Supreme Court of the United States, in the case of *Carroll v. United States*, 45 Sup. Ct. Rep., 280, says:

"The damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. 'To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; * * * in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice.'"—(Sir William Scott.)

We respectfully submit that in the case at bar the plaintiffs in error did not have a fair trial, and that the errors complained of were committed to their manifest prejudice; and that the court erred in refusing to grant them a new trial.

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In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 5436 5021

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JAMES E. REECE, *Plaintiffs in Error.*

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE WEST-
ERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Presiding Judge.*

Brief of Defendant in Error

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Brief of Defendant in Error

STATEMENT OF THE CASE

The above named plaintiffs in error were, together with one Noland Nelson, indicted for conspiring to violate the National Prohibition Act and certain revenue statutes of the United States. (Tr. p. 2).

The Government dismissed the cause as against Noland Nelson and the plaintiffs in error were brought to trial.

The Government's evidence was to the effect that on May 18, 1926, Prohibition Agents Croxall and Lambert, accompanied by deputy sheriffs, went by automobile to a point about two miles north of the Rainier National Park on the main road to that park. At that point they turned to the right onto a plank road which ends at the Nisqually River. At the end of this road the party found an old abandoned lumber camp, consisting of a number of shacks, a garage and a barn. (Tr. pp. 30, 53).

In the garage, which was open at both ends, the party found a Master Six Buick touring car, bearing Washington 1926 license No. 111-205, and a Ford touring car with Pierce County temporary license No. 5683. (Tr. pp. 31, 32, 59). The Buick touring car was shown to belong to DAVE NIELSEN. (Tr. p. 57). The Ford was owned by JAMES E. REECE. (Tr. p. 57). The back seats of both of these cars were missing. In the bottom of the Ford car and in the back thereof was found some fine cornmeal of the same kind as was later found at the still. (Tr. pp. 32, 59).

The rear end of the Buick automobile contained a rug with fringe on the edges. On this rug and on the carpet in the bottom of the car was lint of the sort which comes from gunnysacks. (Tr. p. 31).

In the barn on the premises a Chevrolet roadster was found which bore Washington 1926 license No. 111-206. This was shown to belong to CHARLES NIELSEN. (Tr. p. 57). Under the seat of this car a sugar sack was found, bearing the mark "Sea Island Sugar." (Tr. pp. 32, 54). Twelve empty "Sea Island Sugar" sacks were found along side of the automobile in the barn. These were covered by an old mattress which had apparently been but recently placed there, for there were no dust marks upon the mattress. (Tr. p. 32). On the sawdust in the barn and near this car was the imprint of two kegs. (Tr. p. 32). In the back of the Chevrolet further, some cornmeal was discovered, loose, of the sort also found in the Ford. (Tr. p. 32).

Government's evidence further showed that "Sea Island" sugar is an unrefined cane sugar of coarse grade. (Tr. p. 33).

The agents and the deputy sheriffs discovered fresh footprints in the sand and mud, it having rained the

night before, which led both from the garage and the barn down to a log crossing the river.

From the opposite end of the log across the river, fresh tracks led to a trail. (Tr. p. 30). Agent Croxall and Deputy Sheriff Jeffery followed this trail into the woods, with Croxall leading, for about fifty feet.

As these officers approached the edge of "Big Creek," which parallels the Nisqually, Croxall heard someone shout "Look out," and at this time several men ran into the woods. Two of them were pursued by Croxall, who shouted to them to stop, and who fired two shots into the air in an endeavor to halt them, but the men escaped. The officers made a search but were unable to find the men. (Tr. p. 30).

Returning to the trail Agent Croxall rejoined Deputy Sheriffs Jeffery and Badyala, who had discovered a still of three hundred fifty gallons capacity on the bank of Big Creek.

At the still there were two 1,000 gallon tanks of cornmeal and sugar mash. One tank of mash was in a high state of fermentation. The other tank had just been set and the cornmeal therein had not all been absorbed into the liquid, but some of it was still dry and floating

on the top. (Tr. p. 31). This cornmeal was of the same sort as that found in the bottom of the Ford touring car and the Chevrolet roadster. (Tr. p. 82).

Four 100 pound sacks of Sea Island Sugar were under a tree near the tanks. There were also three 52 gallon barrels, one containing about two gallons of whiskey and the other about four. (Tr. p. 31).

The still was hot but only contained water and was not in operation.

The officers destroyed the entire plant by burning the same. After this, they returned to the cabins on the west side of the Nisqually River and closely examined the automobiles, the trails and the tracks leading from the car to the still. (Tr. p. 31).

At the still, the officers observed a brindle bulldog. When the officers had returned to the cabins, this bulldog came to the first cabin and entering the same went under the table. He was wet at the time, indicating that he had swum across the river. Tr. pp. 33, 36).

In this cabin were a number of camping supplies, some fishing tackle, some tools and bedding, and a number of papers. The fishing basket was full of No. 10 corks, the kind used for kegs. There was also in this cabin about twenty pounds of the same variety of Sea

Island sugar as had been found at the still. The name of JAMES E. REECE was found on an automobile license in one of the coats hanging on the wall and there were a number of papers and letters in the coat indicating that JAMES E. REECE had occupied this cabin. (Tr. pp. 32, 54, 61).

Under the back portion of this cabin and in plain sight from the rear of the building were two gallon whiskey jugs which contained a few drops of liquor and smelled strongly of moonshine whiskey. (Tr. p. 32).

Immediately to the rear of this cabin and about fifty feet from the back door, Deputy Sheriff Mohrbach found a gunnysack about half full of copper clippings and small pieces of copper of the same kind as had been used in the manufacture of the still found across the river. (Tr. p. 51). In the second cabin, which was the one occupied by Noland Nelson, who was dismissed from the cause, the party found a half pint of moonshine whiskey, and on the bed an empty quart bottle that smelled of moonshine whiskey and had a few drops in the bottom. (Tr. p. 34).

The moonshine whiskey in the bottle was identified by Agent Croxall as having a peculiar taste and being

identical in taste with whiskey which he had tasted some two years before, which last mentioned whiskey was manufactured, to Agent Croxall's knowledge, by the defendant DAVE NIELSEN. (Tr. pp. 34-38).

ARGUMENT.

After consideration of this evidence, the jury returned a verdict of guilty as to the three defendants who are plaintiffs in error here.

Plaintiffs in error on page 25 of their brief argue their assignments of error under the following three points:

First, that the trial court erred in admitting the evidence concerning the bottle of whiskey found in the home of Noland Nelson.

Second, that the court erred in allowing introduction of the testimony concerning the prior manufacture of liquor by defendant DAVE NIELSEN.

Third, that the court erred in refusing to permit the witness Austin to testify on behalf of DAVE NIELSEN to the effect that the latter was going fishing on the day before he was at the still.

Fourth. A fourth assignment of error which is argued on behalf of plaintiffs in error CHARLES NIELSEN and REECE is to the effect that the court erred in refusing to sustain the challenge to the sufficiency of the evidence in the close of the Government's case.

Let us discuss these alleged errors in the order in which they appear in counsel's brief.

UNLAWFUL SEARCH AND SEIZURE

A discussion of the validity of the search of NOLAND NELSON'S shack and the seizure of the bottle of moonshine (Government's exhibit 3), seems to us quite unnecessary. None of these plaintiffs in error made any motion for the suppression of this evidence in advance of trial. No objection was made by these defendants to the introduction in evidence of Government's Exhibit No. 3 at the time of trial and there is no assignment of error predicated upon its reception in evidence. The only assignment of error based on the introduction, at the time of trial, of Government's Exhibit No. 3 refers to the refusal of the court to allow

cross-examination of a Government witness as to whether the witness had a search warrant when he entered Noland Nelson's house. (Assignment of error No. 1).

This cross-examination was obviously immaterial. Further, as stated, there having been no lack of opportunity to present the matter in advance of trial, the court quite properly did not allow the collateral issue to be raised upon trial in this fashion.

The Supreme Court of the United States in the recent case of *Segurola vs. U. S.*, decided November 21, 1927, says:

"Moreover, the principle laid down by this court in *Adams v. New York*, 192 U. S. 585, and recognized as proper in *Weeks v. United States*, 232 U. S. 383, 395, and in *Marron v. United States*, No. 185, October Term, 1927, decided this day, applies to render unavailing, under the circumstances of this case, the objection to the use of the liquor as evidence based on the Fourth Amendment. This principle is that, except where there has been no opportunity to present the matter in advance of trial, *Gouled v. United States*, 255 U. S. 298, 305; *Amos v. United States*, 255 U. S. 313, 316; *Angello v. United States*, 269 U. S. 20, 34, a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of per-

sonal property, which are material and properly offered in evidence, because the court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation and which is wholly independent of it."

It is true that in this case Noland Nelson petitioned for the suppression of the evidence. He, however, was dismissed prior to trial, and the evidence was never used against him. These plaintiffs in error do not claim to have lived in Noland Nelson's house and none of them assert that the bottle of liquor (Government's Exhibit No. 3) belonged to them. As a consequence, they are not in position to raise any question concerning the legality of the search and seizure.

In *U. S. v. Wexler* (D. C. N. Y.), 4 Fed. (2nd) 391, for instance, it was held that if the premises of one conspirator have been unreasonably searched, he alone can complain and the property is admissible against all other defendants.

The principle is rather aptly stated in *Chicco v. U. S.* (C. C. A. 4), 284 Fed. 434, 436, where the court says:

"* * * and even conceding that a search of the latter premises would have been illegal and violative, as against the owner or occupant thereof, of the constitutional inhibition against unlawful search and seizure, still, as was said in the *Silverthorne* case (D. C.) 265 Fed. 857, the prohibition there contained (Fourth and Fifth Amends. U. S. Const.) is for the benefit of the person or individual whose rights have been invaded, and, if that be correct, the only person who could have invoked this protection was the owner of the property, the elder Chicco, and certainly not the person who had unlawfully and clandestinely occupied it as a cache for contraband liquor."

This principle is firmly established in the adjudicated cases. See for example the following:

Graham v. U. S. (C. C. A. 8), 15 Fed. (2nd) 740, 742;

Armstrong v. U. S. (C. C. A. 9), 16 Fed. (2nd) 62, 65;

Lewis v. U. S. (C. C. A. 9), 6 Fed. (2nd) 222;

U. S. v. One Buick Automobile (D. C. Vt.), 21 Fed (2nd) 789, 790;

U. S. v. Murray (D. C. Cal.), 17 Fed. (2nd) 276;

U. S. v. Gass (D. C. Pa.), 17 Fed. (2nd) 996;

U. S. v. Mandel (D .C. Mass.), 17 Fed. (2nd) 270, 273;

Rosenberg v. U. S. (C. C. A. 8), 15 Fed. (2nd) 179;

Schwartz v. U. S. (C. C. A. 5), 294 Fed. 528;

McDaniel v. U. S. (C. C. A. 6), 294 Fed. 769, 771;

Remus v. U. S. (C. C. A. 6), 291 Fed. 501, 511;

Lusco v. U. S. (C. C. A. 2), 287 Fed 69;

Haywood v. U. S. (C. C. A. 6), 268 Fed. 795, 803, 804.

Accordingly, the question of unlawful search and seizure in this case is a moot question and not a proper one for review by this court.

TESTIMONY CONCERNING PRIOR OFFENSE
BY DAVE NIELSEN.

Under this heading of their brief counsel indulge in a few excursions out of the record, an attack on the credibility of a Government witness and a citation of

several cases to the effect that evidence of other offenses committed by a defendant is ordinarily inadmissible. With reference to the credibility of the witness, that was for the jury, and the jury believed the Government witness, the expert testimony of counsel concerning human inability to distinguish different manufacturers of moonshine whiskey to the contrary notwithstanding.

With the cases cited by counsel on this point, likewise, we have no quarrel. They announce a proposition of law which is well settled. Equally well settled, however, is the exception to the rule enunciated by those cases: that, where a circumstance is relevant for some purpose, the incidental revelation, in offering it, of other criminal conduct by a defendant does not stand in the way of receiving the evidence.

Many cases showing the admissibility of the testimony to which objection was here made are collected and approved in: I. WIGMORE on EVIDENCE (2d Ed.) page 761. See also the cases collected in the same volume at pages 464, 465.

The principle announced by these cases is that in the matter of establishing the identity of an accused, rele-

vant evidence is not to be excluded because it incidentally shows the commission of some other offense by the accused.

So, here, Government's Exhibit No. 3 was in evidence. Certain circumstantial evidence tended to show that the moonshine whiskey contained in Government's Exhibit No. 3 was manufactured by defendant DAVE NIELSEN. Under these circumstances, the fact that this moonshine had a peculiar flavor and that whiskey manufactured by the same defendant at a prior time had, to the knowledge of an expert Government witness, the same peculiar flavor, was most relevant evidence as to the identity of the accused. It was properly admitted.

Counsel for plaintiffs in error on page 37 of their brief, indulge in the assertion that they are experts and are prepared to assert that all Western Washington moonshine has the same flavor. The difficulty with this assertion is that it is out of place. Counsel should have been sworn as experts and should have offered their testimony upon the trial. Such testimony would then have been under oath and some opportunity would have been afforded as well for cross-examination con-

cerning the extent of their experience. The assertion has no place in a brief.

As Mr. Wigmore says (I. WIGMORE on EVIDENCE, 2nd Ed., page 757), the evidence of identity should be admitted ordinarily—as it was in this case—leaving it to the defendant to show that the identifying characteristic is possessed by many other objects, if it be so claimed. Counsel did not see fit to present any such evidence. If they had it, they were derelict in their failure to produce it. At any rate, there was no error in the admission of this testimony to establish the identity of this moonshine as having been manufactured by DAVE NIELSEN.

Further, counsel have not seen fit in their brief, to direct attention to the cautionary instructions given by the court at the time of the ruling which is the basis of this assignment of error. As a matter of fact, the court in overruling their belated objection gave the following instruction to the jury (Tr. p. 38):

“The jury will understand that you cannot convict a man of one crime when he is being tried for another crime. All this evidence is going in for and is allowed to go in for is to show, if the prosecution can show it, as being one of the circumstances in the case; that this

liquor is similar to liquor which had theretofore been manufactured by the defendant DAVE NIELSEN."

Having put much in their brief which is not in the record, one wonders why this cautionary instruction was deleted.

REFUSAL OF COURT TO RECEIVE STATEMENTS EXPLANATORY OF ACTS.

Under this heading counsel complain because the court directed the jury to disregard a statement which defendant DAVE NIELSEN is said to have made, a day before the discovery of the operation of the still by Government officers.

S. W. Austin, a witness for the defendants, testified that on the 17th of May, DAVE NIELSEN purchased some groceries and fishing tackle from the witness. Austin further testified that NEILSEN, at the time of making the purchase stated that he was going fishing. Upon motion by the United States Attorney, the court instructed the jury to disregard what NIELSEN said to Austin. (Tr. p. 74). This is urged as error.

In arguing this assignment counsel set forth a quotation from Mr. Wigmore's work on Evidence. (Brief p. 41). Mr. Wigmore himself, however, is an authority opposed to the contention of counsel. The statement was, on its face, self-serving and hearsay. As such, it should be excluded, unless admissible under some recognized exception to the hearsay rule.

Counsel seek to bring the matter within the exception which allows the introduction of hearsay statements when they are part of the *res gestae*. In III. WIGMORE on EVIDENCE (2nd Ed. p. 783), that learned author sets forth the limitations on this exceptions to the hearsay rule, as follows:

"These considerations point out the four simple limitations which attend this use of utterances as verbal acts, namely:

- (1) The conduct to be characterized by the words must be independently material to the issue;
- (2) The conduct must be equivocal;
- (3) The words must aid in giving legal significance to the conduct;
- (4) The words must accompany the conduct."

It will be seen at once, that the testimony ordered stricken in the instant case does not fall within the field defined by the foregoing limitations. In the first

place, the conduct of the defendant, *i.e.*, the purchase of the fishing tackle—was not independently material to the issue, as required by the first of Mr. Wigmore's qualifications.

Secondly, the conduct was not equivocal, as required by the second limitation.

Thirdly, the words do not aid in giving legal significance to the conduct. It would naturally be supposed that a man who purchased fishing lines intended to use them for fishing. No different legal significance was attached to this act by the alleged words of NIELSEN.

Consequently it seems that these words satisfy only the fourth of the requirements of Mr. Wigmore, and were properly withdrawn from the consideration of the jury. In any case, it is difficult to believe that a different ruling could have made any difference in the verdict. (See JUDICIAL CODE, Sec. 269).

INSUFFICIENCY OF EVIDENCE.

We believe that a review of the evidence as set forth in the brief resume at the beginning of this brief shows

clearly that there was ample justification for the verdict of the jury in this case. The evidence, to be sure, was largely circumstantial, but two of plaintiffs in error took the stand in their own behalf and offered their explanation. As the Supreme Court said in the *Segurola* case, *supra*, the jury evidently thought that they protested too much and destroyed their credibility.

However that may be, no question as to the sufficiency of the evidence is before this court. No motion to direct a verdict was made at the conclusion of all of the evidence. The defendants waived the motion they made at the close of the Government's case in chief by introducing evidence themselves.

Nelson vs. U. S. (C. C. A. 8), 18 Fed. (2nd) 522, 524;

Critzer v. U. S. (C. C. A. 9), 8 Fed. (2nd) 266;

Marron v. U. S. (C. C. A. 9), 8 Fed. (2nd) 251, 258;

Goldberg v U. S. (C. C. A. 5), 297 Fed. 98, 101;

Andrews v. U. S. (C. C. A. 9), 224 Fed. 418.

From the foregoing cases it is clear that no review of this evidence by this court would be proper.

Counsel have also assigned as errors, the denial of the motions for new trial and in arrest of judgment. These are not separately discussed in the brief and in any event, the rulings of the trial court with reference thereto are not subject to review.

With reference to the motion for new trial, this court has repeatedly so held. See the cases collected in *Brownlow v. U. S.*, 8 Fed. (2nd) 711, 712, and in *Brown v. U. S.*, 9 Fed. (2nd) 588, 590.

A motion in arrest of judgment ordinarily raises questions apparent on the face of the record alone, not including evidence. A ruling on such a motion likewise is not subject to review.

Critzer v. U. S. (C. C. A. 9), 8 Fed. (2nd) 266;

Gouled v. U. S., 273 Fed. (C. C. A. 2), 506;

Beyer v. U. S., 251 Fed. (C. C. A. 9), 39;

Andrews v. U. S., 224 Fed. (C. C. A. 9), 418.

We respectfully submit therefore, that no reversible error exists in the record in this case, and that the plaintiffs in error were properly found guilty. Accordingly the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney.

ARTHUR E. SIMON,
Assistant United States Attorney.
Attorneys for Defendant in Error.

Office and Postoffice Address:
310 Federal Building, Seattle, Washington.

United States
Circuit Court of Appeals
for the Ninth Circuit.

ANDREW W. MELLON (Director General of Railroads), as Agent,

Plaintiff in Error,

vs.

STANDARD OIL COMPANY (CALIFORNIA),
a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

FILED

JAN 3 - 1927

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

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Attorneys for Defendant and Appellant.

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 17,264.

STANDARD OIL COMPANY (CALIFORNIA),
a Corporation,

Plaintiff,

vs.

JAMES C. DAVIS (Director-General of Railroads)
as Agent, AMADOR CENTRAL RAILROAD COMPANY, a Corporation, HOLTTON INTER-URBAN RAILWAY COMPANY, a Corporation, NEVADA COPPER BELT RAILROAD COMPANY, a Corporation, NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, PACIFIC ELECTRIC RAILWAY COMPANY, a Corporation, VIRGINIA & TRUCKEE RAILWAY, a Corporation, SAN DIEGO

AND ARIZONA RAILWAY COMPANY,
a Corporation, YOSEMITE VALLEY
RAILWAY COMPANY, a Corporation,
Defendants.

PETITION.

Comes now the plaintiff above named and for cause of action against the defendants above named, respectfully shows:

I.

That plaintiff above named, is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California with its principal office located in and a resident of the city and county of San Francisco, California, which said city and county is in the Southern Division of the District Court of the United States, for the Northern District of California. [1*]

II.

That the defendant, James C. Davis, was and is at the time of filing this petition, the duly appointed, qualified and acting agent designated by the President of the United States for the purposes declared in that certain act of Congress entitled "An act to provide for the termination of federal control of railroads and systems of transportation and for other purposes," commonly known and styled as the "Transportation Act, 1920," approved by the President of the United States on February 28,

*Page-number appearing at the foot of page of original certified Transcript of Record.

1920, and particularly for the purposes declared in section 206, paragraph A thereof. That the said James C. Davis as Director-General of Railroads, as Agent, and John Barton Payne, his predecessor, as Director-General of Railroads, as Agent, operated certain railroads transporting the shipments hereinafter referred to, the roads of which railroads now run, and then ran, through the Southern Division of the District Court of the United States for the Northern District of California.

III.

That plaintiff is informed and believes, and therefore alleges that Amador Central Railroad Company, Holton Inter-Urban Railway Company, Neveda Copper Belt Railroad Company, Nevada-California-Oregon Railway, Pacific Electric Railway Company, Virginia & Truckee Railway Company, San Diego and Arizona Railway Company, and Yosemite Valley Railroad Company, defendants above named, are and each of them is and was at all times herein mentioned, a corporation existing under and by virtue of the laws of the State of California, and operating lines of railroads and engaged in the transportation of property between points in the states of California and/or Nevada, as common carriers.

IV.

That during the period extending from August 1, 1918, [2] to and including February 29, 1920, your petitioner shipped or caused to be shipped in carload quantities petroleum products from and to

certain points more particularly described in Exhibit "A" of the complaint in Docket 12,890, before the Interstate Commerce Commission, between the respective parties hereto, which said complaint and exhibit is hereto attached, marked Exhibit 1 and hereby made a part hereof as if fully set forth herein.

V.

That the rates on file with the Interstate Commerce Commission, as of June 24, 1918, from and to the following points, were as follows:

From	To	Commodity	Rate
Rochester, N. Y.	Colfax, Wash.	Petroleum Products	\$1.28
El Segunda, Cal.	Holtville, Cal.	Petroleum Products	.63½
El Segunda, Cal.	Holtville, Cal.	Engine (Naphtha) Distillate	.51½
Ardmore, Okla.	Holtville, Cal.	Gasoline	1.11½
Dallas, Tex.	Holtville, Cal.	Gasoline	1.11½
Harrys, Tex.	Holtville, Cal.	Gasoline	1.11½
Cushing, Okla.	Holtville, Cal.	Gasoline	1.11½
Ardmore, Okla.	Calexico, Cal.	Petroleum Products	1.01½
Rochester, N. Y.	Willbridge, Ore.	Petroleum Products	1.28
Salt Lake City, Utah	Yerington, Nev.	Petroleum Products	1.10½
Ardmore, Okla.	Yerington, Nev.	Gasoline	1.25½
Richmond, Cal.	Yerington, Nev.	Petroleum Products	.84
Salt Lake City, Utah	Carson City, Nev.	Petroleum Products	.96½
Richmond, Cal.	Carson City, Nev.	Petroleum Products	.70

From	To	Rate	Commodity
Sugar Creek, Mo.	Carson City, Nev.	1.09½	Petroleum Products
Salt Lake City, Utah	Alturas, Cal.	1.20½	Petroleum Products
Richmond, Cal.	El Portal, Cal.	.63½	Petroleum Products
Richmond, Cal.	El Portal, Cal.	.42½	Engine (Naphtha) Distillate
El Segunda, Cal.	Palm City, Cal.	.22	Engine (Naphtha) Distillate
El Segunda, Cal.	Palm City, Cal.	.25	Petroleum Products
El Segunda, Cal.	Santee, Cal.	.28½	Petroleum Products
El Segunda, Cal.	Santee, Cal.	.24	Engine (Naphtha) Distillate
Richmond, Cal.	Martell, Cal	.25¼	Engine (Naphtha) Distillate
Richmond, Cal.	Martell, Cal.	.30½	Petroleum Products
Ardmore, Okla.	Clarkdale, Ariz.	1.15½	Gasoline
Ardmore, Okla.	Humboldt, Ariz.	1.08½	Gasoline
Wichita Falls, Tex.	Humboldt, Ariz.	1.08½	Gasoline
Fort Worth, Tex.	Clarkdale, Ariz.	1.15½	Gasoline

increased four and one-half cents for the through continuous movement. [3]

VI.

That on June 25, 1918, the defendants made effective new tariffs, increasing certain class and commodity rates twenty-five per cent from and to the various points of origin and destination hereinabove set forth, pursuant to and in accordance with the Director-General's Order No. 28, effective June 25, 1918, which said advance, in so far as it affected petroleum and petroleum products was changed on July 11, 1918, under Freight Rate Authority No. 96, issued by the Director Division of Traffic, United States Railroad Administration, by authority of the Director-General to a specific increase of four and one-half cents per hundred pounds on rates in effect June 24, 1918 (some tariffs provided May 25, 1918), but not to exceed the fifth class rates as increased June 25, 1918, as more particularly appears from Exhibit 1 attached hereto.

VII.

That in amending the tariffs of rates on petroleum and petroleum products to make effective the four and one-half cent advance above referred to, the carriers under federal control included in their tariffs a provision to the effect that when the charges on a continuous through movement are obtained by the combination of separately established rates, the increase of four and one-half cents per hundred pounds will apply as to the total of such combined rates in effect June 24, 1918 (some tariffs provided

May 25, 1918), fifth class rates as increased June 25, 1918, not to be exceeded, and to the effect that said increase of four and one-half cents per hundred pounds would not apply to each separately established rate, as more particularly appears from Exhibit 1 attached hereto.

VIII.

That the shipments made by plaintiff as hereinabove referred to were made pursuant to and in reliance upon said tariffs and particularly in reliance upon the provision referred to in the foregoing paragraph. That the rates charged and assessed by said defendants [4] for transporting the shipments of plaintiff hereinabove set forth, were in excess of the lawful rates provided in said tariff, and more particularly in the provision in the foregoing paragraph referred to, in that the four and one-half cent advance was applied by the defendants upon each separate factor contained in the combination of factors making the rate for the continuous through movement for the particular shipment in question in some cases, and in other cases the four and one-half cent advance was applied on one factor and a twenty-five per cent advance was applied on the other factor contained in the combination of factors making the rate for the continuous through movement for the particular shipment in question, and said advances were not limited to a single four and one-half cent advance on the rate for the continuous through movement made from the combination of factors. That said charges were paid and borne by plaintiff herein.

IX.

That by reason of the facts alleged in the foregoing paragraphs plaintiff was subjected to the payment of rates and charges for the transportation of the shipments hereinabove referred to, which said rates were, when exacted, in excess of the legally published rates and charges, in violation of Section 1 and Section 6 of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto, and in violation of Section 10 of the Federal Control Act, and plaintiff was damaged thereby in the sum of \$6,659.33, together with interest thereon at the rate of six per cent (6%) per annum.

X.

That heretofore and on or about the 1st day of March, 1921, plaintiff filed its complaint before the Interstate Commerce Commission and against the defendants hereinabove named, praying for reparation on account of such illegal charges, which complaint was docketed under I. C. C. No. 12,890; that a true and correct copy of said complaint is attached hereto and market Exhibit 1, as hereinabove set forth; [5] that after a hearing duly had at which oral and documentary evidence was introduced, the said claims of plaintiff in the above-entitled matter were submitted to the commission on the 25th day of May, 1922, and thereafter on the 11th day of November, 1922, the commission rendered its decision and report in said matter, award-

ing reparation to plaintiff as prayed, a copy of which said report is hereto attached, marked Exhibit 2, and hereby made a part hereof as if fully set forth herein. That subsequent hereto, to wit, on or about the 10th day of December, 1923, the commission made its order awarding to plaintiff reparation in the respective amounts and against the respective defendants as set forth in said order, together with interest thereon, a copy of which said order is hereto attached, marked Exhibit 3 and hereby made a part hereof as if fully set forth herein. That the date of said order which the commission named as the day on or before which said payments were directed to be made, was January 25, 1924. That no part of said payments has ever been made and no part of said amounts has ever been paid.

XI.

That one thousand dollars (\$1,000) is a reasonable attorney's fee for the prosecution of this action.

WHEREFORE, plaintiff prays judgment against the defendant, James C. Davis, Director-General of Railroads, as Agent, in the amount of \$590.47, together with interest thereon from the 1st day of November, 1919, at the rate of six per cent (6%) per annum; and against the defendant, James C. Davis, Director-General of Railroads, as Agent, and the defendant, Nevada Copper Belt Railroad Company, in the amount of \$79.34, together with interest thereon from the 15th day of May, 1919, at the rate

of six per cent (6%) per annum; and against the defendant, James C. Davis, Director-General of Railroads, as Agent, and the defendant San Diego and Arizona Railway Company, in the amount of \$2,149.59, together with interest thereon from the 15th day of January, 1919, at the rate of six per cent (6%) per annum; and against the [6] defendant, James C. Davis, Director-General of Railroads, as Agent, and the defendant, Nevada-California-Oregon Railway, in the amount of \$152.05, together with interest thereon from the 22d day of March, 1920, at the rate of six per cent (6%) per annum; and against the defendant, James C. Davis, Director-General of Railroads, as Agent, and the defendant, Pacific Electric Railway Company, and the defendant, Holton Inter-Urban Railway Company, in the amount of \$923.46, together with interest thereon from the 1st day of April, 1919, at the rate of six per cent (6%) per annum; and against the defendant, James C. Davis, Director-General of Railroads, as Agent, and the defendant, Holton Inter-Urban Railway Company, in the amount of \$420.11, together with interest thereon from the 15th day of November, 1919, at the rate of six per cent (6%) per annum; and against the defendant, James C. Davis, Director-General of Railroads, as Agent, and the defendant, Virginia & Truckee Railway, in the amount of \$447.90, together with interest thereon from the 15th day of January, 1919, at the rate of six per cent (6%) per annum; and against the defendant, James C. Davis, Director-General

of Railroads, as Agent, and the defendant, Yosemite Valley Railroad Company, in the amount of \$968.18, together with interest thereon from the 1st day of May, 1919, at the rate of six per cent (6%) per annum; and against the defendant, James C. Davis, Director-General of Railroads, as Agent, and the defendant, Amador Central Railroad Company, in the amount of \$928.23, together with interest thereon from the 1st day of July, 1919, at the rate of six per cent (6%) per annum; together with a reasonable attorney's fee of one thousand dollars (\$1,000), and to have and receive such other, further and additional relief as may be just and equitable in the premises.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff. [7]

State of California,
City and County of San Francisco,—ss.

J. H. Tuttle, being first duly sworn, deposes and says: That he is an officer, to wit, secretary of Standard Oil Company (California) a corporation, plaintiff named in the foregoing petition; that he makes this affidavit for and on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information or belief, and as to those matters, that he believes it to be true.

J. H. TUTTLE.

Subscribed and sworn to before me this 20th day
of January, 1925.

[Seal] W. H. PYBURN,
Notary Public in and for the City and County of
San Francisco, State of California. [8]

EXHIBIT 1.

Before the Interstate Commerce Commission.

Docket 12,890.

STANDARD OIL COMPANY (CALIFORNIA),
Complainant,

vs.

**JOHN BARTON PAYNE, Director-General of
Railroads as Agent, and AMADOR CEN-
TRAL RAILROAD COMPANY, HOLTON
INTER-URBAN RAILWAY COMPANY,
NEVADA COPPER BELT RAILROAD
COMPANY, NEVADA - CALIFORNIA -
OREGON RAILWAY, PACIFIC ELEC-
TRIC RAILWAY COMPANY, VIRGIN-
IA & TRUCKEE RAILWAY, SAN DIEGO
AND ARIZONA RAILWAY COMPANY,
YOSEMITE VALLEY RAILROAD COM-
PANY,**

Defendants.

The complaint of the above named complainant
respectfully shows:

First: That the Standard Oil Company is a cor-
poration organized under the laws of the State of
California and is engaged in the business of refin-

ing and marketing oils and other products of petroleum, with its principal offices located in the City of San Francisco, California.

Second. That defendant, JOHN BARTON PAYNE, Director General of Railroads, as Agent, is an officer of the United States, appointed by the President, pursuant to the provisions of Section 206 (a) of the Transportation Act, 1920, and as such Agent, is a representative of the Federal Government against whom should be brought actions at law and suits in equity, based on causes of action arising out of the possession, use, or operation by the President of the railroads or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carriers; and that the railroads and systems of transportation [9] over whose lines or routes the rates, rules, or regulations complained of herein applies, and which during Federal control were operated by the Director General of Railroads, are as follows:

Atchison, Topeka & Santa Fe Railway.

Buffalo, Rochester and Pittsburgh Railway Company.

Chicago, Milwaukee and St. Paul Railway Company.

Chicago & North Western Railway Company.

Chicago, Rock Island & Pacific Railway Company.

Chicago, Rock Island & Gulf Railway.

El Paso & Northeastern Railroad Company.

El Paso & Southwestern Railroad Company.

El Paso & Southwestern Railroad Company of Texas.

Fort Worth and Denver City Railway Company.

Galveston, Harrisburg & San Antonio Railway Company.

Gulf, Colorado & Santa Fe Railway.

International & Great Northern Railway (James A. Baker, Receiver).

Missouri, Kansas & Texas Railway (C. E. Shaff, Receiver).

Oregon Short Line Railroad Company.

Oregon-Washington Railroad & Navigation Company.

Panhandle and Santa Fe Railway Company.

Southern Pacific Company.

Spokane, Portland & Seattle Railway Company.

The Belt Railway Company of Chicago.

The Kansas City Southern Railway.

The New York, Chicago & St. Louis Railroad Company.

The Texas and Pacific Railway (J. L. Lancaster and Charles L. Wallace, Receivers).

The Wichita Valley Railway Company.

Union Pacific Railroad Company.

Third: That the defendant carriers named on title page are common carriers engaged in the transportation of property, wholly by railroad, between points in the States of Missouri, Oklahoma, Texas, Utah, New York, Washington, Oregon, Nevada and California, and as such common carriers, are subject to the Act to Regulate Commerce, approved

February 4, 1887, and Acts amendatory thereof or supplemental thereto.

Fourth: That complainant in connection with the distribution of its petroleum products in the States of Nevada and California is engaged in the production of petroleum crude oil and the refining of petroleum and its products at various points in California, and in the purchase of gasoline and other petroleum products at various manufacturing and refining areas in the United States, commodities that are subsequently used or marketed in the states hereinbefore named.

Fifth. That during the period extending from August 1, 1918 to and including February 29, 1920, complainant purchased for use or marketing and commercial purposes, considerable quantities of [10] petroleum products and shipped or caused to be shipped in carload quantities from and to the following points generally characterized, and as described in Exhibit "A," attached hereto and made a part hereof, freight charges thereon paid and borne by complainant on basis in excess of the legal freight rates as shown below, which are the rates lawfully on file with the Interstate Commerce Commission as of June 24, 1918, increased four and one half cents for the through continuous movement:

From	To	Rate	Commodity.
Rochester, N. Y.	Colfax, Wash.	\$1.28	Petroleum Products
El Segunda, Cal.	Holtville, Cal.	.63 $\frac{1}{2}$	Petroleum Products
El Segunda, Cal.	Holtville, Cal.	.51 $\frac{1}{2}$	Engine (Naphtha) Distillate
Ardmore, Okla.	Holtville, Cal.	1.11 $\frac{1}{2}$	Gasoline
Dallas, Tex.	Holtville, Cal.	1.11 $\frac{1}{2}$	Gasoline
Harrys, Tex.	Holtville, Cal.	1.11 $\frac{1}{2}$	Gasoline
Cushing, Okla.	Holtville, Cal.	1.11 $\frac{1}{2}$	Gasoline
Ardmore, Okla.	Calexico, Cal.	1.01 $\frac{1}{2}$	Petroleum Products
Rochester, N. Y.	Willbridge, Ore.	1.28	Petroleum Products
Salt Lake City, Utah	Yerington, Nev.	1.10 $\frac{1}{2}$	Petroleum Products
Ardmore, Okla.	Yerington, Nev.	1.25 $\frac{1}{2}$	Gasoline
Richmond, Cal.	Yerington, Nev.	.84	Petroleum Products
Salt Lake City, Utah	Carson City, Nev.	.96 $\frac{1}{2}$	Petroleum Products
Richmond, Cal.	Carson City, Nev.	.70	Petroleum Products

From	To	Rate	Commodity.
Sugar Creek, Mo.	Carson City, Nev.	1.09½	Petroleum Products
Salt Lake City, Utah	Alturas, Cal.	1.20½	Petroleum Products
Richmond, Cal.	El Portal, Cal.	.63½	Petroleum Products
Richmond, Cal.	El Portal, Cal.	.42½	Engine (Naphtha) Distillate
El Segunda, Cal.	Palm City, Cal.	.22	Engine (Naphtha) Distillate
El Segunda, Cal.	Palm City, Cal.	.25	Petroleum Products
El Segunda, Cal.	Santee, Cal.	.28½	Petroleum Products
El Segunda, Cal.	Santee, Cal.	.24	Engine (Naphtha) Distillate
Richmond, Cal.	Martell, Cal.	.25¼	Engine (Naphtha) Distillate
Richmond, Cal.	Martell, Cal.	.30½	Petroleum Products
Ardmore, Okla.	Clarkdale, Ariz.	1.15½	Gasoline
Ardmore, Okla.	Humboldt, Ariz.	1.08½	Gasoline
Wichita Falls, Tex.	Humboldt, Ariz.	1.08½	Gasoline
Fort Worth, Tex.	Clarkdale, Ariz.	1.15½	Gasoline

Sixth. That on June 25, 1918, the defendants made effective new schedule materially increasing all class and commodity rates from and to the various points of origin and destination, pursuant to and in accordance with the Director General's Order No. 28, effective June 25, 1918, all of which advanced rates, insofar as they were applicable to petroleum and its products, were subsequently commuted to a specific horizontal advance of four and one-half cents over those rates in effect as of May 25, 1918 (fifth class rates as of June 25, 1918 not to [11] be exceeded), the latter basis ordered in under the Administration's Freight Rate Authority No. 96, issued July 11, 1918, the intent and effect of which authority as affecting lines under Federal Control was addressed to Federal controlled railroads and tariff issuing Agents contemplating and instructing the immediate revision, on one day's notice, of rates on petroleum and its products to basis of four and one-half cents per 100 pounds higher than the rates in effect on May 25, 1918, but not to exceed the fifth class rates contemporaneously maintained as provided in Western Classification.

Seventh. That, in the producing, refining and marketing area north of the Ohio River and west of the Mississippi River, wherein rates were affected by Freight Rate Authority No. 96, hereinbefore indicated all petroleum tariffs and schedules naming rates on petroleum and its products were duly amended and issued pursuant to and in accordance with the following general instructions from the Director, Division of Traffic, to all committees, un-

der date of July 11, 1918, and incident to Freight Rate Authority No. 96.

“Please issue instructions Tariff Issuing Agents to provide for new tariffs on Petroleum and Petroleum Products, carloads, classified fifth class in Official, Southern and Western Classification as follows:

“Rates as published on June 25th, per Order 28 shall be immediately amended to following basis. $4\frac{1}{2}\text{¢}$ per 100 pounds higher than rates in effect on May 25th but not to exceed the present increased class rates, under headings as provided in Western, Southern, and Official Classifications.

“The advances of $4\frac{1}{2}\text{¢}$ per 100 pounds to apply to continuous through haul by publication of through or proportional rates. To cover movement over midecontinent field to C. F. A. and Eastern Trunk Line territory established proportional rates to Chicago or Mississippi River of $2\frac{1}{2}$ cents per 100 pounds and [12] proportional rates from Chicago or Mississippi River to Eastern destinations of 2¢ per 100 pounds higher than rate in effect on May 25th. This combination would produce the total advances of $4\frac{1}{2}$ cents per 100 pounds on the through movement. Tariffs to be issued on one day’s notice using Freight Rate Authority No. 96, and to carry legend shown in Circular 1-A.”

Eighth. That in amending the tariffs naming rates on petroleum and its products to make effective the specific horizontal advance of four and

one-half cents over the rates in effect May 25, 1918, as contemplated and directed by Freight Rate Authority No. 96, the carriers under Federal Control included in their tariffs a provision to the effect, that when the charges on a continuous through movement are obtained by combination of separately established rates, the increase of four and one-half cents per 100 pounds will apply as to the total of such combined rates in effect May 25, 1918. Fifth Class rates as increased June 25, 1918, not to be exceeded.

Ninth. That in incorporating in their tariffs a provision to the effect that when charges on a continuous through movement are obtained by combination of separately established rates, that the increase of four and one-half cents per one hundred pounds will apply as to the total of such combined rates, there is a holding out to the shipper of the rate so constructed, and that the carriers should make good that holding out.

That defendants have not made good that holding out, but have repeatedly assessed, demanded and collected charges by applying increases to each of the factors instead of to the aggregate of the factors used in constructing the rates.

Tenth. That by reason of the facts in the foregoing paragraphs, complainant has been subjected to the payment of rates and charges for transportation which were, when exacted, in excess of the legally published rates and charges and in violation of Section 6 of [13] the Act to Regulate Commerce, approved February 4, 1887, and Acts amendatory thereof and supplementary thereto, and

in violation of Section 10 of the Federal Control Act.

WHEREFORE, complainant prays that defendants may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants to pay to complainant by way of reparation of the unlawful charges hereinbefore alleged, such sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainant is entitled to as an award of damages under the provisions of said Act for violation thereof, and such other and further orders be made as the Commission may consider proper in the premises.

STANDARD OIL COMPANY (CALIFORNIA).

By _____,

Traffic Manager,

Dated at San Francisco, California, February 21, 1921. [14]

EXHIBIT "A."

Standard Oil Company (California). 23

Date of B/L	Car Initial and Number	From	To	Route
11-12-19	OCGX	5225 Ardmore, Okla.	Humboldt, Ariz.	GC&SF—AT&SF
11-25-19	UTL	7856 Wichita Falls, Tex.	"	WV—T&P—AT&SF
Date of B/L	Car Initial and Number	From	To	Route
11- 1-19	INTX	494 Ardmore, Okla.	Clarkdale, Ariz.	GC&SF—AT&SF
11-28-19	OCGX	5396 "	"	"
12-27-19	CKRX	134 "	"	"
Date of B/L	Car Initial and Number	From	To	Route
8- 2-18	UTL	5998 El Segundo, Cal.	Palm City, Cal.	AT&SF—SD&A Ry.
8-17-18	"	3473 "	"	"

Date of B/L	Car Initial and Number	From	To	Route AT&SF—SD&A Ry.
8-17-18	UTL	6272	El Segundo, Cal.	"
8-19-18	"	5672	"	"
8-28-18	"	2592	"	"
9- 6-18	"	5834	"	"
9- 6-18	"	5919	"	"
9-12-18	"	6216	"	"
9-13-18	"	5796	"	"
9-13-18	"	6338	"	"
9-19-18	"	2325	"	"
9-19-18	"	3473	"	"
9-19-18	"	5357	"	"
9-27-18	"	5626	"	"
9-27-18	"	6221	"	"
10- 2-18	"	31030	"	"
10- 2-18	"	3771	"	"

Date of B/L	Car Initial and Number	From	To	Route
		El Segundo, Cal.	Palm City, Cal.	AT&SF—SD&A Ry.
10-11-18	UTL	3314	"	"
10-11-18	"	2269	"	"
10-15-18	"	6244	"	"
10-17-18	"	2630	"	"
10-23-18	"	1817	"	"
10-23-18	"	5550	"	"
10-24-18	"	5672	"	"
10-30-18	"	6280	"	"
11- 2-18	"	5866	"	"
11- 5-18	"	5440	"	"
11- 7-18	"	4986	"	"
11-13-18	"	5029	"	"
11-22-18	"	5963	"	"
11-30-18	"	5495	"	"
11-30-18	"	5771	"	"

Date of B/L	Car Initial and Number	From	To	Route
11-30-18	UTL 4986	El Segundo, Cal.	Palm City, Cal.	AT&SF—SD&A Ry.
12-14-18	" 4138	"	"	"
12-14-18	" 5931	"	"	"
12-24-18	" 4971	"	"	"
12-30-18	" 6168	"	"	"
[15]				
9-13-18	" 5357	"	"	"
8- 8-18	" 6244	"	"	"
8- 8-18	" 2696	"	"	"
1- 4-19	" 5765	"	"	"
1- 6-19	" 6060	"	"	"
1-11-19	" 3466	"	"	"
1-20-19	" 6172	"	"	"
1-23-19	" 6108	"	"	"
1-23-19	" 3197	"	"	"

Date of B/L	Car Initial and Number.	From	To	Route
		El Segundo, Cal.	Palm City, Cal.	AT&SF—SD&A Ry.
2- 1-19	UTL	5114		
2- 6-19	"	5440	"	"
2- 6-19	"	5849	"	"
2-10-19	"	2330	"	"
2-13-19	"	2988	"	"
2-25-19	"	2460	"	"
2-25-19	"	3572	"	"
3- 8-19	"	6140	"	"
3-14-19	"	5114	"	"
3-18-19	"	3314	"	"
3-21-19	"	3564	"	"
3-31-19	"	3466	"	"
4-18-19	"	3510	"	"
5- 2-19	"	5477	"	"
5-10-19	"	3444	"	"

Date of B/L	Car Initial and Number	From	To	Route	AT&SF—SD&A Ry.
5-13-19	UTL	2956	El Segundo, Cal.	"	"
5-19-19	"	5855	"	"	"
5-19-19	"	3930	"	"	"
5-24-19	"	6044	"	"	"
5-31-19	"	5626	"	"	"
6-10-19	"	5479	"	"	"
6-24-19	"	6168	"	"	"
7- 5-19	"	5403	"	"	"
7-10-19	"	5962	"	"	"
7-14-19	"	4130	"	"	"
7-19-19	"	5765	"	"	"
7-25-19	"	5765	"	"	"
8- 6-19	"	6255	"	"	"
8- 6-19	"	6060	"	"	"

Date of B/L	Car Initial and Number	From	To	Route AT&SF—SD&A Ry.
8-11-19	UTL	5660	El Segundo, Cal.	"
10-20-19	"	5550	"	"
10-20-19	"	5963	"	"
11- 4-19	"	6272	"	"
11-10-19	"	5769	"	"
12- 3-19	"	3613	"	"
12-13-19	"	5796	"	"
1- 3-20	"	5436	"	"
1-29-20	"	5866	"	"
1-31-20	"	5771	"	"
2-13-20	"	5492	"	"
2-18-20	"	5980	"	"

Date of B/L	Car Initial and Number	From	To	Route PE-SP-HI Ry.
8-14-18	UTL	5403	El Segundo, Cal.	Holtville, Cal.
8-26-18	"	6255	"	"
8-30-18	CNW	90036	"	"
9- 3-18	UTL	5381	"	"
9-19-18	"	5862	"	"
9-27-18	"	5796	"	"
9-30-18	"	5660	"	"
10- 1-18	MLT	30334	"	"
10-11-18	UTL	2343	"	"
11- 1-18	"	4821	"	"
11- 9-18	"	6280	"	"
11-12-18	"	5537	"	"
11-16-18	"	6255	"	"
11-25-18	"	3510	"	"
12-10-18	"	5963	"	"

Date of B/L	Car Initial and Number	From	To	Route PE—SP—HI Ry.
12-20-18	UTL	3510	El Segundo, Cal.	Holtville, Cal.
12-26-18	"	5818	"	"
1- 3-19	"	6012	"	"
1- 9-19	"	6255	"	"
1-10-19	"	3411	"	"
1-21-19	"	5550	"	"
1-30-19	"	5414	"	"
2-11-19	"	2405	"	"
2-13-19	"	1877	"	"
2-21-19	"	6250	"	"
2-24-19	"	2928	"	"
3- 1-19	"	6053	"	"
3- 7-19	"	5094	"	"
3-14-19	"	3572	"	"
3-20-19	"	5440	"	"

Date of B/L	Car Initial and Number	From	To	Route
3-27-19	UTL	5543	El Segundo, Cal.	Holtville, Cal.
4-10-19	"	2330	"	"
4-18-19	"	4130	"	"
5- 2-19	"	2028	"	"
5- 8-19	"	5960	"	"
5- 9-19	SP	36446	"	"
5-12-19	UTL	6044	"	"
5-24-19	"	5765	"	"
5-24-19	"	2893	"	"
6- 9-19	"	5862	"	"
6-17-19	"	5550	"	"
6-18-19	"	2716	"	"
6-28-19	"	6044	"	"
7- 5-19	"	5553	"	"
7-12-19	"	5403	"	"

Date of B/L	Car Initial and Number	From	To	Route
7-26-19	UTL	5922	El Segundo, Cal.	PE—SP—HI Ry.
8-13-19	"	5980	"	"
8-21-19	"	5624	"	"
9- 4-19	"	5237	"	AT&SF—SP—HI
			Ry.	Ry.
9- 6-19	"	5834	"	"
9-11-19	"	6314	"	"
9-19-19	"	6005	"	"
9-29-19	"	5550	"	"
9-29-19	"	5887	"	"

Date of B/L	Car Initial and Number	From	To	Route Ry.	AT&SF—SP—HI
10- 1-19	UTL 2835	El Segundo, Cal.	Holtville, Cal.		
10-10-19	"	5381	"	"	"
10-14-19	"	5960	"	"	"
10-27-19	"	6113	"	"	"
11- 4-19	"	5785	"	"	"
11- 7-19	"	5442	"	"	"
11-14-19	"	6113	"	"	"
11-18-19	"	6012	"	"	"
11-21-19	"	5818	"	"	"
11-21-19	"	5931	"	"	"
12- 1-19	"	5855	"	"	"
12- 8-19	"	3960	"	"	"
12- 9-19	"	5660	"	"	"
12-23-19	"	6028	"	"	"
12-26-19	"	2716	"	"	"

Date of B/L	Car Initial and Number	From	To	Route
12-29-19	UTL	5511	El Segundo, Cal.	AT&SF—SP—HI Ry.
1- 7-20	"	6172	"	PE—SP—HI Ry.
1- 8-20	"	5766	"	"
1- 9-20	"	6297	"	"
1-26-20	"	30712	"	"
2- 2-20	"	2236	"	"
2-13-20	"	5818	"	"
2-27-20	"	5550	"	"
2-28-20	"	15045	"	"
3-28-19	"	2613	Richmond, Cal.	SPCo—NCB RR.
3-31-19	"	15216	"	" "
4-16-19	"	2181	"	" "
4-18-19	"	3603	"	" "
5-14-19	"	5122	"	" "
5-28-19	"	15603	"	" "

Date of B/L	Car Initial and Number	From	To	Route SPCo—NCB RR.
6- 9-19	UTL 15717	Richmond, Cal.	Yerington, Nev.	" "
6- 9-19	" 13854	"	"	" "
7- 8-19	" 4960	"	"	" "
7-11-19	" 11456	"	"	" "
8- 2-19	" 2702	"	"	" "
8-16-19	CMSTP 501883	"	"	" "
8-21-19	UTL 15625	"	"	" "
8-30-19	" 10983	"	"	" "
9-22-19	" 11155	"	"	" "
10- 2-19	" 3429	"	"	" "
10- 4-19	" 14477	"	"	" "
10-29-19	" 2363	"	"	" "
11-13-19	NW 60773	"	"	" "
11-18-19	UTL 2674	"	"	" "
12-30-19	SP 87160	"	"	" "

Date of B/L	Car Initial and Number	From	To	Route
2-20-20	UTL	5767 Ardmore, Okla.	Holtville, Cal.	GCSF — AT&SF — CRI&P—CRI&G
2-21-20	"	1846	"	CRI&P—EP&SW --
2-24-20	"	5520	"	SP—Holtville Interurban Ry.
Date of B/L	Car Initial and Number	From	To	Route
1-22-20	UTL	31197 Salt Lake City, " Utah	Yerington, Nev.	O.S.I.—S.P.—N.C.B.
2- 6-20	"	2699	"	" " "
2- 9-20	"	5464	"	" " "
2-25-20	"	5244	"	" " "
Date of B/L	Car Initial and Number	From	To	Route
1-26-20	UTL	6046 Salt Lake City, " Utah	Alturas, Cal.	W.P. — Hackstaff —
2-24-20	"	6143	"	" N.C.O.

Date of B/L	Car Initial and Number	From	To	Route
1-15-20	UTL 6143	Salt Lake City, Utah	Carson City, Nev.	O.S.L.—S.P.—V.&T.
2-25-20	" 15686	"	"	" " "
Date of B/L	Car Initial and Number	From	To	Route
7-25-19	UTL 11784	Sugar Creek, Mo.	Carson City, Nev. K.C.S.—UP—SP—V&T	" " "
7-25-19	" 21954	"	"	" " "
8- 3-19	" 21300	"	"	" " "
8-11-19	" 8162	"	"	" " "
8-16-19	" 10420	"	"	" " "
9- 3-19	" 6180	"	"	" " "
9- 8-19	" 21532	"	"	" " "
Date of B/L	Car Initial and Number	From	To	Route
8-23-18	CB&Q 114877	Rochester, N. Y.	Willbridge, Ore.	BR&P — NYC&STL —BRC — CM&STP

Date of B/L	Car Initial and Number	From	To	Route
8-29-18	GN 21134	"	Colfax, Wash.	UP — OSL — OWR &N — SP&S. " " "
4- 9-19	UTL 17801	"		BR&P — NYC&STL —C&NW — UP— OSL — OWR&N —SP&S.
4- 8-19	NYP&N 2417	"		BR&P — NYC&STL —C&NW — UP— OSL — OWR&N. GC&SF — AT&SF— UP — SP — NCB Ry.
11-28-19	OCGX 5222	Ardmore, Okla.	Yerington, Nev.	GC&SF — AT&SF— UP — SP — NCB Ry.
12- 4-19	" 320		Calexico, Calif.	GC&SF — T&P—SP
				[19]

Date of B/L	Car Number and Initial	From Richmond, Cal.	To El Portal, Cal.	Route S.P.Co. — Y.V.R.R
8-12-18	UTL	1835		"
8-16-18	"	8397		"
9- 3-18	"	11150	"	"
10-30-18	"	10160	"	"
5- 7-19	"	2407	"	"
6- 4-19	"	14349	"	"
6- 9-19	"	12714	"	"
6-14-19	"	2423	"	"
6-14-19	"	10859	"	"
6-16-19	"	15409	"	"
6-17-19	NYC	239946	"	"
6-17-19	UTL	10167	"	"
6-20-19	"	10601	"	"
6-24-19	"	11016	"	"
6-27-19	"	15498	"	"
6-30-19	"	2444	"	"

Date of B/L	Car Number and Initial	From	To	Route
7- 3-19	UTL	10870	Richmond, Cal.	S.P.Co.—Y.V.R.R.
7-10-19	"	11125	"	"
7-14-19	"	15467	"	"
7-19-19	"	3308	"	"
7-25-19	"	15754	"	"
7-28-19	"	14955	"	"
8- 2-19	EJE	50494	"	"
8- 9-19	UTL	12582	"	"
8-15-19	"	12346	"	"
8-26-19	"	11035	"	"
9-15-19	"	10153	"	"
Date of B/L	Car Number and Initial	From	To	Route
8-14-18	SP	35923	Richmond, Cal.	S.P.Co.—V.&T.R.R.
8-19-18	UTL	3727	"	"

Date of B/L	Car Number and Initial	From	To	Route	S.P.Co — V.&T.R.R.
8-30-18	UTL	22144	Richmond, Cal.	"	"
9-14-18	"	3134	"	"	"
9-20-18	"	2461	"	"	"
10-11-18	"	2013	"	"	"
10-30-18	LV	81868	"	"	"
10-31-18	UTL	2696	"	"	"
11-29-18	"	21924	"	"	"
11-30-18	"	4175	"	"	"
12-23-18	"	2956	"	"	"
1-25-19	"	2880	"	"	"
3-13-19	"	2169	"	"	"
4-10-19	LEW	43778	"	"	"
4-10-19	UTL	16467	"	"	"
4-17-19	"	3558	"	"	"

Date of B/L	Car Number and Initial	To	From	Route	S.P.Co.—V.&T.R.R.
5-22-19	UTL	2674	Richmond, Cal.	"	"
6- 5-19	"	3290	"	"	"
6-27-19	"	10859	"	"	"
7- 3-19	"	15216	"	"	"
7-19-19	"	11130	"	"	"
7-22-19	"	8209	"	"	"
8-29-19	"	2335	"	"	"
9-16-19	NYC	196382	"	"	"
9-22-19	UTL	3837	"	"	"
10- 2-19	"	2358	"	"	"
10-16-19	"	3478	"	"	"
10-20-19	"	11245	"	"	"
11-13-19	CMSTP	206962	"	"	"

Date of B/L	Car Initial and Number	From	To	Route A.T.&S.F.— S.D.&A.
		El Segundo, Cal.	Santee, Cal.	Ry.
8-22-18	UTL	5408	"	"
8-27-18	"	1678	"	"
8-27-18	"	6244	"	"
9- 6-18	"	6238	"	"
9-23-18	"	6021	"	"
10-31-18	"	5847	"	"
11-22-18	"	4986	"	"
11-22-18	"	5660	"	"
12-24-18	"	5980	"	"
10-25-18	"	6213	"	"
10-15-18	"	5960	"	"
1-11-19	"	5771	"	"
1-21-19	"	5810	"	"

Date of B/L	Car Initial and Number	From	To	Route A.T.&S.F.—S.D.&A. Ry.
1-31-19	UTL	6222	El Segundo, Cal.	"
2-25-19	"	4960	"	"
3-20-19	"	5395	"	"
3-28-19	"	5414	"	"
4-18-19	"	2992	"	"
5-10-19	"	5847	"	"
5-17-19	"	6060	"	"
6- 7-19	"	3123	"	"
6- 9-19	"	2434	"	"
6-27-19	"	6244	"	"
7- 8-19	"	5849	"	"
7-15-19	"	6060	"	"
7-25-19	"	5564	"	"

Date of B/L	Car and Number	Initial and Number	From	To	Route A.T.&S.F.—S.D.&A. Ry.
8-18-19	UTL	6238	EI Segundo, Cal.	Santee, Cal.	"
8-21-19	"	6060	"	"	"
10- 4-19	"	5765	"	"	"
10-20-19	"	5887	"	"	"
10-25-19	"	5926	"	"	"
11- 5-19	"	8347	"	"	"
12-30-19	"	5442	"	"	"
12-31-19	"	6113	"	"	"
1-22-20	"	5697	"	"	"
1-29-20	"	2096	"	"	"
2-13-20	"	31162	"	"	"
2-21-20	"	5553	"	"	"
4-28-19	"	1826	"	"	"

Date of B/L	Car Initial and Number	Initial Number	From	To	Route	S.P.Co. — A.C.R.R.
8-12-18	UTL	10633	Richmond, Cal.	Martell, Cal.		
8-30-18	"	14223	"	"	"	"
9- 6-18	"	13870	"	"	"	"
9-13-18	"	8344	"	"	"	"
9-23-18	IC	23910	"	"	"	"
9-27-18	UTL	10633	"	"	"	"
9-30-18	"	16339	"	"	"	"
10- 5-18	"	14353	"	"	"	"
10-11-18	"	12831	"	"	"	"
10-26-18	"	15040	"	"	"	"
10-26-18	"	15477	"	"	"	"
10-30-18	SP	23160	"	"	"	"
11- 7-18	UTL	19037	"	"	"	"
11-25-18	"	18304	"	"	"	"

Date of B/L	Car and Number	Initial From	To Martell, Cal.	Route S.P.Co.—A.C.R.R.
11-25-18	UTL	15643	Richmond, Cal.	"
11-29-18	"	10792	"	"
12-12-18	"	11448	"	"
12-28-18	MC	92561	"	"
12-28-18	UTL	16339	"	"
1- 3-19	"	8618	"	"
1-24-19	"	13240	"	"
2- 1-19	"	12558	"	"
2- 7-19	"	12582	"	"
2-21-19	"	15603	"	"
3- 8-19	"	15425	"	"
3-10-19	CSTPMO	31812	"	"
3-13-19	UTL	11614	"	"
3-28-19	"	14341	"	"

Date of B/L	Car Initial and Number	From	To	Route
4- 4-19	UTL 15480	Richmond, Cal.	Martell, Cal.	S.P.C.O.—A.C.R.R.
4-18-19	" 11016	"	"	"
4-18-19	" 15886	"	"	"
4-22-19	LV 81578	"	"	"
4-25-19	UTL 15318	"	"	"
5- 1-19	" 11448	"	"	"
5- 9-19	" 14332	"	"	"
5-16-19	" 15898	"	"	"
5-17-19	" 11148	"	"	"
5-23-19	" 10374	"	"	"
6- 3-19	" 11155	"	"	"
6- 6-19	" 15252	"	"	"
6- 9-19	" 10667	"	"	"

Date of B/L	Car Initial and Number	From	To	Route S.P.Co.—A.C.R.R.
6-12-19	UTL	11155	Richmond, Cal.	"
6-14-19	CNW	81336	"	"
6-20-19	UTL	15877	"	"
6-27-19	"	15464	"	"
7- 5-19	"	20674	"	"
7-11-19	"	11448	"	"
7-12-19	"	14955	"	"
7-12-19	"	10529	"	"
7-18-19	"	14343	"	"
7-18-19	"	11048	"	"
7-19-19	"	15847	"	"
7-26-19	"	15878	"	"
7-30-19	"	10167	"	"

Date of B/L	Car Initial and Number	Initial Number	From	To	Route
8- 2-19	ERIE	90140	Richmond, Cal.	Martell, Cal.	S.P.Co. — A.C.R.R.
8- 9-19	UTL	15394	"	"	"
8-14-19	"	11245	"	"	"
8-20-19	"	14349	"	"	"
8-29-19	"	11148	"	"	"
9-15-19	LV	82571	"	"	"
9-17-19	UTL	15603	"	"	"
9-23-19	"	10682	"	"	"
9-23-19	"	11189	"	"	"
10- 6-19	"	15128	"	"	"
10-17-19	"	14841	"	"	"
10-21-19	"	15467	"	"	"

Date of B/L	Car Initial and Number	From	To Martell, Cal.	Route S.P.Co.—A.C.R.R.
10-29-19	UTL 14353	Richmond, Cal.	"	"
10-30-19	" 8389	"	"	"
11- 5-19	BM 49945	"	"	"
11- 5-19	UTL 8271	"	"	"
11-13-19	" 15506	"	"	"
11-14-19	" 8271	"	"	"
11-28-19	" 8212	"	"	"
11-28-19	" 15464	"	"	"
12- 3-19	" 10622	"	"	"
12- 8-19	" 15014	"	"	"
12- 9-19	SP 81316	"	"	"
12-22-19	UTL 15264	"	"	"

Date of B/L	Car Initial and Number	From	To	Route S.P.Co.—A.C.R.R.
12-26-19	" 15848	Richmond, Cal.	Martell, Cal.	" "
1- 3-20	" 15491	"	"	" "
1- 6-20	" 10660	"	"	" "
1-12-20	" 10721	"	"	" "
1-21-20	" 8388	"	"	" "
1-22-20	" 15898	"	"	" "
2-10-20	" 15305	"	"	" "
2-14-20	STL&SW 26154	"	"	" "
2-19-20	UTL 8234	"	"	" "
2-24-20	" 15040	"	"	" "
2-27-20	" 8229	"	"	" "

EXHIBIT 2.

No. 12890.

STANDARD OIL COMPANY (CALIFORNIA)
v. DIRECTOR GENERAL, AS AGENT,
AMADOR CENTRAL RAILROAD COM-
PANY, ET AL.

Submitted May 25, 1922.

Decided November 11, 1922.

Shipments of petroleum and petroleum products, in carloads, from and to points in various States, found overcharged. Reparation awarded.

W. O. BANKS and W. B. ROBERTS for Complainant.

FRED H. WOOD, JAMES A. BELL, CHARLES D. MAHAFFIE, SANBORN & ROEHL, C. W. DURBROW, ELMER WESTLAKE, FRANK B. AUSTIN, HAVEN, ATHEARN, CHANDLER & FARMER, and T. M. WOODWARD for Defendants.

REPORT OF THE COMMISSION.

Division 4, Commissioner Meyer, Daniels, and Potter.

By Division 4:

Exceptions were filed by defendants to the report proposed by the examiner, and the issues were orally argued before us.

Complainant, a corporation, by complaint filed February 26, 1921, alleges that the rates charged on

numerous carload shipments of petroleum and petroleum products from and to points in various States,¹ during the period August 1, 1918, to February 29, 1920, inclusive, were illegal, in violation of section 6 of the interstate commerce act and section 10 of the Federal control act. Reparation is sought. The issue is solely one of tariff interpretation.

The rates on petroleum and petroleum products throughout the country were increased 25 per cent, effective June 25, 1918, in accordance with General Order No. 28 of the Director General of Railroads. Freight rate authority No. 96, issued by the railroad administration on July 11, 1918, prescribed a flat increase of 4.5 cents per hundred pounds in the rates of lines under Federal control, in lieu of the 25 per cent advance. It further provided that the increase

¹ The points of origin and destination are as follows:

From Ardmore, Okla., to Holtville, Calif.; Calexico, Calif.; Yerington, Nev.; Clarksdale, Ariz.; Humboldt, Ariz.

From El Segundo, Calif., to Holtville, Calif.; Palm City, Calif.; Santee, Calif.

From Richmond, Calif., to Yerington, Nev.; Carson City, Nev.; El Portal, Calif.; Martel, Calif.

From Salt Lake City, Utah, to Yerington, Nev.; Carson City, Nev.; Alturas, Calif.

From Rochester, N. Y., to Colfax, Wash., and Willbridge, Oreg.

From Cushing, Okla., to Holtville, Calif.

From Sugar Creek, Mo., to Carson City, Nev.

From Dallas, Tex., to Holtville, Calif.

From Harrys, Tex., to Holtville, Calif.

From Wichita Falls, Tex., to Humboldt, Ariz.

From Fort Worth, Tex., to Clarksdale, Ariz. [24]

would apply but once where the charges on a continuous through movement were obtained by combination of separately established factors.

Some of the shipments moved entirely over lines which were under federal control, but the majority of them moved partly over such lines and partly over noncontrolled lines, hereinafter called short lines. There were no joint through rates in effect, and charges were assessed on basis of the combination rates in effect June 24, 1918, plus 4.5 cents as added to the separate factors applicable over the lines under Federal control and either 4.5 cents or 25 per cent added to the factors published by the short lines. In every instance a tariff naming some one of the factors applicable over a federally controlled line handling the shipment carried a rule in substance providing that the increase of 4.5 cents would be applied but once to combinations of rates on through movements. The tariffs of the short lines did not so provide, nor did they refer to tariffs in which the rule was published.

The rates assessed are assailed as illegal to the extent that they exceeded the through combinations in effect June 24, 1918, plus 4.5 cents. Complainant contends that the publication of the combination rule in one of the tariffs used in making the combination rates on the through shipments constituted a holding out to the shipper of rates so constructed which must be protected. The situation here, with respect to movements which were entirely over lines under Federal control is identical with that consid-

ered in Sligo Iron Store Co. vs. W. M. Ry. Co., 62 I. C. C. 643. [25]

As to the shipments which moved partly over short lines, defendants contend that since the through rates were based on combinations of factors published separately by the lines under Federal control and by the short lines, neither tariff carrying reference to the other, each factor of the combination was subject to the increase; that the director general had no control over the action of the short lines, which alone were responsible for the publication of their tariffs; and, on the other hand, that the short lines should not be bound by a rule published in the tariffs of the lines under Federal control in which they did not concur.

The short lines neither published nor concurred in the combination rule and therefore were not subject to its provisions. But the rule as published by the lines under Federal control was not limited in application to movements over such lines, and the director general must protect the basis of rates so offered to the public. The principle involved in this situation cannot be distinguished from that announced in the Sligo case. In fact the precise question was decided in Madison Lumber & Mill Co. vs. Director General, 64 I. C. C. 699.

We find, following the cases cited, that the applicable rates on the shipments were those in effect June 24, 1918, plus 4.5 cents per 100 pounds; that the shipments were overcharged; that complainant made the shipments as described and bore the freight charges thereon; that it has been damaged thereby

in the amount of the difference between the charges paid and those which would have accrued at the rates herein found applicable; and that it is entitled to reparation from the director general, as agent, with interest. Rule V of the Rules of Practice should be complied with.

By the commission, division 4.

(Seal)

GEORGE B. McGINTY,
Secretary. [26]

EXHIBIT 3.

ORDER.

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 10th day of December, A. D., 1923.

No. 12,890.

STANDARD OIL COMPANY (CALIFORNIA)
vs.

DIRECTOR GENERAL, AS AGENT, AND
AMADOR CENTRAL RAILROAD COM-
PANY, et al.

IT APPEARING, That on November 11, 1922, the commission entered its report in the above-entitled proceeding, which is hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, we find the complainant is entitled to awards of reparation from defendants named in the following table in the amounts set opposite their respective names, with interest:

Defendants.	Amounts from With interest from	
JAMES C. DAVIS, Director General of Railroads, as Agent	\$590.47	November 1, 1919.
JAMES C. DAVIS, Director General of Railroads, as Agent, and Nevada Copper Belt Railroad Company	79.34	May 15, 1919.
JAMES C. DAVIS, Director General of Railroads, as Agent, and San Diego and Arizona Railway Company	2,149.59	January 15, 1919.
JAMES C. DAVIS, Director General of Railroads, as Agent, and Nevada-California-Oregon Rail- way	152.05	March 22, 1920.
JAMES C. DAVIS, Director General of Railroads, as Agent; Pacific Electric Railway Company; and Holton Interurban Railway Company.....	923.46	April 1, 1919.

Defendants	Amounts from	With interest
JAMES C. DAVIS, Director General of Railroads, as Agent, and Holton Interurban Railway Com- pany	\$420.11	November 15, 1919.
JAMES C. DAVIS, Director General of Railroads, as Agent, and Virginia & Truckee Railway.....	447.90	January 15, 1919.
JAMES C. DAVIS, Director General of Railroads, as Agent, and Yosemite Valley Railroad Com- pany	968.18	May 1, 1919.
JAMES C. DAVIS, Director General of Railroads, as Agent, and Amador Central Railroad Com- pany	928.23	July 1, 1919.

IT IS THEREFORE ORDERED, That the defendants named in the above table, be, and there are hereby, authorized and directed to pay unto complainant, Standard Oil Company (California) on or before January 25, 1924, the amounts set opposite their respective names in said table with interest thereon at the rate of 6 per cent per annum from the dates therein set forth, as reparation on account of overcharges collected on numerous carload shipments of petroleum and petroleum products from and to points in various states.

Permission is hereby given to any other carriers which may have participated in the transportation herein involved to join in payment of the reparation above awarded on shipments which moved via their lines.

By the Commission:

(Seal)

GEORGE B. McGINTY,
Secretary.

[Endorsed]: Filed Jan. 20, 1925. [27]

[Title of Court and Cause.]

DEMURRER TO COMPLAINT.

Now comes James C. Davis (Director-General of Railroads, as Agent, and demurs to the complaint or petition on file in the above-entitled case, and for grounds of demurrer thereto specifies as follows, to wit:

I.

That it appears from the face of said complaint or

petition that plaintiff's supposed cause of action against defendants and each of them is barred by the provisions of Subdivision (a) of Section 206 of the Transportation Act, 1920.

II.

That said complaint or petition does not state facts sufficient to constitute a cause of action. [28]

WHEREFORE, said defendant prays this demurrer be sustained and that he be hence dismissed with costs of suit.

ALEX M. BULL,
F. W. MIELKE,
JAMES E. LYONS,

Attorneys for Defendant James C. Davis (Director-General of Railroads) as Agent.

I hereby certify that I am one of the attorneys for the defendant James C. Davis (Director-General of Railroads) as Agent, in the above-entitled action and that I have read the foregoing demurrer and know the contents thereof and that in my opinion the same is well taken in point of law and is not filed for the purpose of delay.

JAMES E. LYONS.

Receipt of a copy of the within demurrer is admitted this 23d day of March, 1925.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 23, 1925. [29]

[Title of Court and Cause.]

(OPINION ON ORDER OVERRULING DEMURRER.)

June 23, 1925.

Messrs. PILLSBURY, MADISON & SUTRO,
San Francisco,
Attorneys for Plaintiff.

JAMES E. LYONS, Esq., ALEX M. BULL, Esq.,
and F. W. MIELKE, Esq.,
Attorneys for Certain Defendants.

FRANK KARR, Esq., 670 Pacific Elec. Bldg., Los
Angeles, California,
Attorney for Pacific Electric Ry. Co., Deft.

H. K. LANDRAM, Esq.,
Attorney for Defendant, Yosemite Valley
Railroad Company.

PART RIDGE.—Plaintiff herein has filed its petition to enforce an award of the Interstate Commerce Commission. The award was made on December 10, 1923, but it directed that the payment should be on or before January 25, 1924. The petition was filed January 20, 1925. This award included a number of connecting carriers, all of which were made parties to the petition in this court. However, on January 16, 1924, one of these roads, the Yosemite Valley Railroad Company, filed an application with the Commission, setting up error and inadvertence in including them in the order. This application

was [30] granted, and on the 18th of April, 1925, the commission made an order that the order of December 10, 1923, be "amended *nunc pro tunc*," by omitting therefrom these connecting carriers. The defendant *is* this case appeared and resisted that order, upon the ground that the commission had lost jurisdiction. Subsequently, and on May 6, 1925, the plaintiff filed an amendment to its petition, setting up this supplemental order, and dismissing as to all defendants except the Director-General. Demurrer to the petition is filed, setting up the statute of limitations. The position of defendant is, that petition to enforce an award of the Interstate Commerce Commission must be filed within one year after the date of the order; plaintiff, on the other hand, contends that the year does not commence to run until the time when the money is to be paid. It is said in the briefs that there is no decision directly upon the question, and I know of none.

The original statute of 1887 (24 St. at Large 384), provided that if the commission found that a shipper was entitled to reparation, it should direct repayment to be made "within a reasonable time to be fixed by the commission" (Section 15). Section 16 gave the shipper the right to apply to the Circuit Court to enforce the payment. The act contained no period of limitation, but the Supreme Court held in *Meeker vs. Lehigh Valley R. R. Co.*, 236 U. S. 412, that the suit must be filed within the time limited by the statutes of the State in which the court

was sitting. Under this statute, the commission usually specified the number of days within which the order should be obeyed. Later, however, it developed the practice of naming a time "on or before" which payment should be made. It is perhaps worthy of note, that this time was always spoken of by the commission and the bar as the "effective date" of the order; [31] and indeed this language has been adopted in the proceedings of all the public service and railroad commissions of the various states. However, the act has been amended to conform to the practice, and has added a period of limitation, so as to make the time of filing suit uniform in the various jurisdictions. Subdivision 1 of Section 16 now provides that the commission shall direct payment "on or before a day named." Subdivision 2 provides that if payment is not made "within the time limit in such order" the shipper may file suit. Subdivision 3, then limits the time "within one year from the date of the order."

The demurrer, then, is based upon the use of the word "of," instead of "in." The argument is that the date "of" the order is the date of its promulgation, and not the date specified for the payment.

It is, of course, fundamental in all the law pertaining to statute of limitations, that they are to be computed from the time when the party could have brought his suit. Indeed, even after the time has commenced to run, it may be suspended "tolled" by disability to sue. Clearly, under the Act here, the plaintiff could not have brought its suit until after

the "effective date" of the order. Moreover, it might readily happen that for one reason or other the commission would postpone the payment until a year after its order. It is thus seen that the construction contended for by plaintiff is more reasonable, and at the same time in consonance with settled principles relating to statutes of limitations.

But, it cannot be said that "the date of the order," under a strict construction, necessarily means the date of its promulgation. The language is equally susceptible of the meaning [32] "date fixed by the order." That this is the reasonable and time honored interpretation is made clear by the language of the Supreme Court in *Mutual Life Insurance Co. vs. Hurni Packing Co.*, 263 U. S. 167, where it is said:

"The word 'date' is used frequently to designate the actual time when an event takes place, but, as applied to written instruments, its primary signification is the time specified therein. Indeed this is the meaning which its derivation (*datus*—given) most naturally suggests. In *Bement & Daugherty vs. Trenton Locomotive etc. Co.*, 32 N. J. L. 513, 515-516, it is said: 'The primary signification of the word date, is not time in the abstract, nor time taken absolutely, but as its derivation plainly indicates, time given or specified, time in some way ascertained and fixed; this is the sense in which the word is commonly used. * * * '''

It was the avowed intention of Congress to make the law uniform, and thus avoid the difficulties

arising from the decision in Meeker vs. Lehigh Valley R. R. Co. (*supra*). But it would not be in form if the time might be greater or less, according to the effective date fixed in the order.

Let the demurrer be overruled.

PARTRIDGE, D. J.

[Endorsed]: Filed June 23, 1925. [33]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held in the courtroom thereof, in the city and county of San Francisco, on Tuesday, the 23d day of June, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable JOHN S. PARTRIDGE, District Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 23, 1926—
ORDER OVERRULING DEMURRER.

The demurrer to the petition herein, heretofore heard and submitted, being fully considered, and the Court having filed its written opinion thereon, it is in accordance with said opinion, ordered that said demurrer be and the same is hereby overruled. [34]

[Title of Court and Cause.]

MOTION TO DISMISS.

Now comes the defendant, James C. Davis (Director-General of Railroads) as Agent, and on the records, pleadings and files in the above-entitled case, hereby moves the Court to dismiss the complaint herein upon the ground that it appears on the face of said complaint that plaintiff's supposed cause of action is barred by the provisions of Sub-division (a) of Section 206 of the Transportation Act, 1920.

WHEREFORE, said defendant prays the judgment of this Honorable Court whether he shall be compelled to make further or any answer to said complaint; and he humbly prays to be hence dismissed with costs in this behalf sustained.

ALEX M. BULL,
F. W. MIELKE,
JAMES E. LYONS,

Attorneys for Defendant James C. Davis. [35]

I hereby certify that I am one of the attorneys for the defendant James C. Davis (Director-General of Railroads) as Agent, in the above-entitled action and that I have read the foregoing motion to dismiss and know the contents thereof and that in my opinion the same is well taken in point of law and is not filed for the purpose of delay.

JAMES E. LYONS.

Receipt of a copy of the within motion is admitted
this — day of March, 1925.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 23, 1925. [36]

[Title of Court and Cause.]

AMENDMENT AND SUPPLEMENT TO
PETITION.

Comes now plaintiff above named, and leave of the Court being first had and obtained, files this its amendment and supplement to the original petition heretofore filed herein on the 20th day of January, 1925, and avers that it is informed and believes and upon such information and belief alleges:

I.

That on the 16th day of January, 1924, one of the defendants herein named, to wit, Yosemite Valley Railroad Company, applied to the Interstate Commerce Commission, mentioned in the original petition herein, for an order amending the order of the commission referred to in the original petition herein by striking [37] therefrom the names of said Yosemite Valley Railroad Company, and also of Amador Central Railroad Company, Holton Inter-Urban Railway Company, Nevada Copper Belt Railroad Company, Nevada-California-Oregon Railway, Pacific Electric Railway Company, Virginia & Truckee Railway and San Diego and

Arizona Railway Company and all reference or direction to said carriers with like effect as if said names and all such reference and direction had not been contained in said order when originally entered. Said application was made by said Yosemite Valley Railroad Company upon the ground that the action of the commission in imposing liability upon said carriers was erroneous, and that said commission should extinguish said liability by amending said order.

II.

That under date of February 12, 1924, the Chief Examiner of said Interstate Commerce Commission advised this plaintiff, the said Director-General, and all said carriers, that an amended order would be issued in conformity with said application of said Yosemite Valley Railroad Company.

III.

That thereupon and on or about the 10th day of March, 1925, the said Director-General filed a protest with said Interstate Commerce Commission against the making of any order by it for the purpose of extinguishing the liability of said Yosemite Valley Railroad Company and the other carriers hereinabove mentioned upon the ground that said liability, as well as the liability imposed by said order on the Director-General, was already extinguished by reason of the fact that this plaintiff had not filed any petition for the enforcement of said order on or before December 10, 1924, and said Director-General claimed [38] that, by reason of

said fact, said order was no longer enforceable and could not be amended.

IV.

That thereupon said Interstate Commerce Commission was duly informed that the petition herein had been filed in this court on the 20th day of January, 1925, and therefore within one year from the date named in the order mentioned in the original petition as the day on or before which payment should be made, and it was claimed that therefore the liability of said Yosemite Valley Railroad Company and the other carriers in the said order had not become extinguished but was still in full force and effect.

V. U

That thereupon and on or about the 18th day of April, 1925, said commission, being duly advised in the premises, considered that said liability of said Yosemite Valley Railroad Company and other carriers had not become extinguished but had been kept in full force and effect because plaintiff had filed its petition in this court on the 20th day of January, 1925, as aforesaid, and therefore within one year from the date of said order, and thereupon said commission amended said order and extinguished said liability of said Yosemite Valley Railroad Company and said other carriers by striking from said order the names of, and all reference and direction to, said carriers with like force as if said names and all reference and direction to said carriers had not been contained in the order when originally entered. That a copy of said

amended order is hereto attached, marked Exhibit "A" and hereby referred to and made a part hereof.

That because of said amendment to said order and for no other reason plaintiff hereby dismisses this action as to the [39] defendants, Yosemite Valley Railroad Company, Amador Central Railroad Company, Holton Inter-Urban Railway Company, Nevada Copper Belt Railroad Company, Nevada-California-Oregon Railway, Pacific Electric Railway Company, Virginia & Truckee Railway and San Diego and Arizona Railway Company.

WHEREFORE, plaintiff prays judgment against the defendant, James C. Davis, Director-General of Railroads, as Agent, in the amount of \$590.47, together with interest thereon from the 1st day of November, 1919, at the rate of six per cent (6%) per annum; and in the amount of \$79.34, together with interest thereon from the 15th day of May, 1919, at the rate of six per cent (6%) per annum; and in the amount of \$2,149.59, together with interest thereon from the 15th day of January, 1919, at the rate of six per cent (6%) per annum; and in the amount of \$152.05, together with interest thereon from the 22d day of March, 1920, at the rate of six per cent (6%) per annum; and in the amount of \$923.46, together with interest thereon from the 1st day of April, 1919, at the rate of six per cent (6%) per annum; and in the amount of \$420.11, together with interest thereon from the 15th day of November, 1919, at the rate of six per cent (6%) per annum; and in the amount of \$447.90, together with interest thereon from the 15th day of January, 1919,

at the rate of six per cent (6%) per annum; and in the amount of \$968.18, together with interest thereon from the 1st day of May, 1919, at the rate of six per cent (6%) per annum; and in the amount of \$928.23, together with interest thereon from the 1st day of July, 1919, at the rate of six per cent (6%) per annum; together with a reasonable attorneys' fee of one thousand dollars (\$1,000), and to have and receive such other, further and additional relief as may be just and equitable in the premises.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff. [40]

State of California,
City and County of San Francisco,—ss.

J. H. Tuttle, being first duly sworn, deposes and says: That he is an officer, to wit, Secretary of Standard Oil Company (California), a corporation, plaintiff, named in the foregoing petition; that he makes this affidavit for and on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information or belief, and as to those matters, that he believes it to be true.

J. H. TUTTLE.

Subscribed and sworn to before me this 5th day of May, 1925.

[Seal] FRANK S. OWEN,
Notary Public, in and for the City and County of
San Francisco, State of California. [41]

EXHIBIT "A."

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 18th day of April, A. D. 1925.

No. 12890.

STANDARD OIL COMPANY (CALIFORNIA)
vs.

DIRECTOR GENERAL, AS AGENT, AND
AMADOR CENTRAL RAILROAD COMPANY, ET AL.

IT APPEARING, That on December 10, 1923, the Commission entered its order in the above-entitled proceeding, and this proceeding coming on for further consideration, and it appearing that through inadvertence the names of the following carriers, viz.:

Amador Central Railroad Company,
Holton Interurban Railway Company,
Nevada Copper Belt Railroad Company,
Nevada-California-Oregon Railway,
Pacific Electric Railway Company,
Virginia & Truckee Railway,
San Diego and Arizona Railway Company,
Yosemite Valley Railroad Company,
were included in the order and direction thereby made, and good cause appearing therefor:

IT IS ORDERED, That the said order entered

herein on December 10, 1923, be and it is hereby, amended *nunc pro tunc* by striking therefrom the names of and all reference or direction to said carriers with like effect as if said names and all reference and direction to said carriers had not been contained in said order when originally entered.

By the Commission:

(Seal)

GEORGE B. McGINTY,
Secretary.

Receipt of a copy of the within amendment to petition is hereby admitted this 6th day of May, 1925.

ALEX M. BULL et al.,
Attorneys for Deft.

[Endorsed]: Filed May 6, 1925. [42]

[Title of Court and Cause.]

STIPULATION AND ORDER THAT DEMURRER TO COMPLAINT SHALL STAND AS DEMURRER TO AMENDED COMPLAINT.

IT IS HEREBY STIPULATED that the demurrer of defendant James C. Davis to the original petition or complaint on file herein and the motion of said defendant to dismiss said original complaint or petition shall stand as a demurrer and motion to dismiss the said original petition or complaint as amended and supplemented by the amendment and supplement to said original petition on file herein,

with like effect as if said demurrer and motion specifically named said petition as amended and supplemented.

Dated: San Francisco, California, May 12, 1925.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

ALEX M. BULL,

F. W. MIELKE,

JAMES E. LYONS,

Attorneys for Defendant James C. Davis (Director-General of Railroads), as Agent.

It is so ordered.

PARTRIDGE,

U. S. District Judge.

[Endorsed]: Filed May 14, 1925. [43]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 26th day of August, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

**MINUTES OF COURT — AUGUST 26, 1925 —
ORDER DENYING MOTION TO DISMISS.**

* * * Mr. Bull made a motion to dismiss on behalf of defendant, and after argument it was

ordered that said motion be and the same is hereby denied. * * * [44]

[Title of Court and Cause.]

FIRST AMENDED ANSWER.

Now comes James C. Davis (Director-General of Railroads) as agent of the President against whom actions at law, suits in equity and proceedings in admiralty based on causes of action arising out of the possession, use or operation by the President of the railroad or system of transportation of any carrier under Federal Control (under the provisions of the Federal Control Act or Act of August 29, 1916) of such character as prior to Federal Control could have been brought against such carrier, leave of Court being first had and obtained, and hereby amends his answer to the petition or complaint herein as amended and supplemented, and for a first answer and defense thereto admits, denies and alleges as follows, to wit:

FIRST DEFENSE.

I.

Alleges that said petition or complaint as amended and supplemented is barred by the provisions of Subdivision (a) of Section 206 of the Transportation Act, 1920. [45]

Further answering said complaint and by way of second and separate defense thereto, said defendant alleges:

SECOND DEFENSE.

I.

Admits the allegations of Paragraphs I, II, III, IV, VI and X of the original petition and Paragraph III of the amendment and supplement to said petition. Said defendant denies generally and specifically the allegations of Paragraph V of said petition. Said defendant further denies generally and specifically the allegations of Paragraphs I and II of said amendment and supplement to petition and alleges the fact to be that on February 20, 1925, the Yosemite Valley Railroad Company telegraphed the Interstate Commerce Commission, requesting that the order of the said commission referred to in the original petition herein, be amended by striking therefrom the names of the corporate defendants, and that on February 21st, and not otherwise, the said commission replied that it was contemplating the issuance of an amended order, and that under date of February 24th, 1925, the Chief Examiner of said commission advised plaintiff herein that the previous order was in error and that an amended order would be issued at the earliest practical date.

II.

Said defendant admits the allegations of Paragraph VII of said petition except that he denies that in amending the rates on petroleum and petroleum products to make effective the 4½ cent advance referred to in said petition the carriers under Federal [46] Control included in all through tariffs a pro-

vision to the effect that when the charges on a continuous through movement are obtained by the combination of separately established rates, the increase of four and *on-half* cents per 100 pounds will apply as to the total of such combined rates in effect June 24, 1918, or otherwise, fifth class rates as increased June 25, 1918, not to be exceeded and/or to the effect that said increase of $4\frac{1}{2}$ cents per 100 pounds would not apply to each separately established rate as set forth in Exhibit One attached to said petition or otherwise and in this connection defendant alleges that all of the tariffs of the carriers under federal control covering rates on petroleum and petroleum products in effect on the dates of and applicable to the shipments referred to in Paragraph IV of said petition did not contain the provision above mentioned.

III.

For lack of information or belief sufficient to enable him to answer, said defendant denies the allegations of Paragraphs IV and V of said amendment and supplement to said petition, except that he admits the issuance by the Interstate Commerce Commission on or about April 18, 1925, of the order mentioned in Paragraph V, a copy of which is annexed to said supplement marked Exhibit "A."

IV.

Answering Paragraph VIII of said complaint, said defendant denies that the rates or any rate charged and assessed by this defendant for transporting the shipments or any of them, of plaintiff

referred to in said petition were or was in excess of the lawful rates provided in the applicable tariffs or any [47] of them. Admits that the 4½ cent advance was applied under the provisions of said tariffs upon each separate factor in some cases, and in other cases the 4½ cents was applied on one factor and a twenty-five per cent advance was applied on the other factor making the gross rate, and that said advances were not limited to a single 4½ cent advance on the gross rate for a continuous through movement on combination of factors.

V.

Answering Paragraph IX of said petition, said defendant denies that by reason of the facts stated in said petition or complaint as amended and supplemented or any facts, plaintiff was subjected to the payment of rates and charges, or any rate, or any charge, for the transportation of the shipments or any of them referred to in said petition which were or was when exacted in excess of the legally published rates and/or charges, or in excess of any legally published rate and/or charge, or in violation of Section 1 and/or Section 6 of the Act to Regulate Commerce, and/or acts amendatory thereto, and/or supplemental thereto, and/or in violation of Section 10 of the Federal Control Act, or otherwise unlawful.

Said defendant denies that plaintiff was damaged thereby or otherwise in the sum of \$6,659.33, together with interest thereon at the rate of six per cent per annum or otherwise or in any other sum or amount whatsoever.

VI.

Answering Paragraph XI of said petition, said defendant denies that \$1,000.00 or any other sum or amount, is a reasonable attorney's fee for the prosecution of this action and in this respect alleges that this defendant in his capacity as representative [48] of the United States of America, is not liable for any attorneys' fees, interests or costs.

VII.

Further answering Paragraph X of said petition, said defendant avers that the order of the Interstate Commerce Commission entered on the 10th day of December, 1923, in said commission's docket No. 12,890, Standard Oil Company vs. Director-General et al., and upon which recovery is predicated in this action, is erroneous and void for the following reasons, to wit:

(1) Because the findings, and the order of the commission for the payment of reparation in said Docket No. 12,890 of said commission, are not supported by any substantial evidence and are contrary to the evidence.

(2) Because the commission erred as a matter of law in finding that the rates charged were inapplicable because there was no cross-reference between the various tariffs covering the shipments in question and because all of the tariffs covering the movement of said shipments do not contain the rule referred to in Paragraph VII of said petition.

(3) Because the commission erred as a matter of law in finding and concluding that there was a

holding out to the plaintiff of rates constructed by the use of said rule applied but once to the combination of rates on through movements which the Director-General of Railroads was obliged to protect.

(4) Because the commission erred as a matter of law in finding and deciding that there could be any holding out of a rate other than that duly and regularly published in the tariffs legally applicable at the time the respective shipments were made; and,

(5) Because the commission erred as a matter of [49] law in making an allowance of interest against the Director-General of Railroads and/or this defendant in his representative capacity as agent of the President.

WHEREFORE, said defendant prays that said petition be dismissed and that he have judgment for his costs.

ALEX KOPLIN,
ALEX M. BULL,
Washington, D. C.,
F. W. MIELKE,
JAMES E. LYONS,

Attorneys for Defendant James C. Davis, as Agent
of the President as Above Indicated, 65 Market
St., San Francisco, Cal.

State of California,
City and County of San Francisco,—ss.

James E. Lyons being first duly sworn, deposes
and says: That he is one of the attorneys for the
defendant James C. Davis in the above-entitled ac-

tion; that he makes this verification for and on behalf of said defendant for the reason that defendant is not within the city and county of San Francisco, State of California, wherein affiant has and maintains his office and place of business; that affiant has read the foregoing first amended answer and knows the contents thereof and that the same is true except as to such matters as are therein stated upon information or belief and as to such matters that he believes it to be true.

JAMES E. LYONS.

Subscribed and sworn to before me this 20th day of August, 1925.

[Seal] FRANK HARVEY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Aug. 26, 1925. [50]

[Title of Court and Cause.]

STIPULATION WAIVING JURY.

It is hereby stipulated by the respective parties above named that a jury for the trial of the above-entitled case be waived.

Dated: San Francisco, August 14th, 1925.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

ALEX M. BULL,

ALEX KOPLIN,

J. E. LYONS,

Attorneys for Defendant.

[Endorsed]: Filed Aug. 17, 1925. [51]

[Title of Court and Cause.]

**STIPULATION AND ORDER SUBSTITUTING
DEFENDANTS.**

James C. Davis (Director-General of Railroads) as Agent of the President designated under Subdivision (a) of Section 206 of the Transportation Act, 1920, having resigned from such office, effective December 31, 1925, and Andrew W. Mellon having been appointed Director-General of Railroads and Agent designated by the President under the provisions of Subdivision (a) of Section 206 of the Transportation Act, 1920, effective January 1, 1926:

IT IS HEREBY STIPULATED that Andrew W. Mellon (Director-General of Railroads) as such Agent may be substituted herein in the place and stead of said James C. Davis, and that said James C. Davis may be dismissed. All motions and pleadings heretofore filed and exceptions made on behalf of said defendant Davis shall be deemed to have been filed or made on behalf of his successor, Andrew W. Mellon.

Dated: San Francisco, California, January 19th,
1926.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.
ALEX M. BULL,

Hurley-Wright Bldg., Washington, D. C., [52]

F. W. MIELKE,
JAMES E. LYONS,

65 Market St., San Francisco, California,
Attorneys for Andrew W. Mellon (Director-General
of Railroads), as Agent Designated by the
President Under the Provisions of Subdivision
(a) of Section 206 of the Transportation Act,
1920, Successor to James D. Davis.

It is so ordered.

ST. SURE,
United States District Judge.

[Endorsed]: Filed Jan. 22, 1926. [53]

[Title of Court and Cause.]

**OPINION ON ORDERING JUDGMENT FOR
PLAINTIFF.**

This is an action to enforce an order of the Interstate Commerce Commission, made December 10, 1923, in Standard Oil Company (California) vs. Director-General as Agent et al., on the report of the commission of November 11, 1922 (74 I. C. C. 188), directing reparation payment of \$6,659.33 with interest as specified on or before January 25, 1924.

An attorney's fee of \$1,000 for prosecution of this action is also asked, no payment under the order of the commission having been made.

The award originally ran against a number of connecting carriers not under federal control, as well as the defendant Director-General as Agent, but was later amended by supplemental order eliminating them. The petition in this action, filed January 20, 1925, included these carriers as defendants, but the supplemental order of the commission, filed thereafter *nunc pro tunc*, was made the basis of an amendment and supplement to plaintiff's petition filed May 6, 1925, setting up the [54] supplemental order of the commission and dismissing the action as to all but the Director-General as Agent, and directing the entire reparation, with interest, to be paid by him.

A demurrer to the petition setting up the statute of limitations was overruled by Judge Partridge on June 23d, 1925. His opinion seems to me conclusive of the point, and disposes of the first defense of the amended answer.

At the trial the entire record before the commission was introduced in evidence. The matter was then argued and submitted on briefs. The facts are not in dispute, the issue being entirely one of tariff interpretation. The report of the commission, on which the reparation order was made, shows that the same points were there raised and fully considered. I feel that I can make no better statement of the facts and issues than by incorporating such report

and the footnote appended thereto, at this point. It is as follows:

“REPORT OF THE COMMISSION.”

Division 4, Commissioners Meyers, Daniels and Potter.

By Division 4:

Exceptions were filed by defendants to the report proposed by the examiner, and the issues were orally argued before us.

Complainant, a corporation, by complaint filed February 26, 1921, alleges that the rates charged on numerous carload shipments of petroleum and petroleum products from and to points in various states¹, during the period August 1, 1918, to February 29, 1920, inclusive, were illegal, in violation of section 6 of the interstate commerce act and

¹The points of origin and destination are as follows:

From Ardmore, Okla., to Holtville, Calif.; Calexico, Calif.; Yerington, Nev.; Charksdale, Ariz.; Humboldt, Ariz.

From El Segunda, Calif., to Holtville, Calif.; Palm City, Calif.; Santee, Calif.

From Richmond, Calif., to Yerington, Nev.; Carson City, Nev.; El Portal, Calif.; Martell, Calif.

From Salt Lake City, Utah, to Yerington, Nev.; Carson City, Nev.; Alturas, Calif.

From Rochester, N. Y., to Colfox, Wash., and Willbridge, Oreg.

From Cushing, Okla., to Holtville, Calif.

From Sugar Creek, Mo., to Carson City, Nev.

From Dallas, Tex., to Holtville, Calif.

From Harrys, Tex., to Holtville, Calif.

From Wichita Falls, Tex., to Humboldt, Ariz.

From Fort Worth, Tex., to Clarksdale, Ariz.”

section 10 of the Federal control act. Reparation is [55] sought. The issue is solely one of tariff interpretation.

The rates on petroleum and petroleum products throughout the country were increased 25 per cent, effective June 25, 1918, in accordance with General Order No. 28 of the Director-General of Railroads. Freight rate authority No. 96, issued by the railroad administration on July 11, 1918, prescribed a flat increase of 4.5 cents per hundred pounds in the rates of lines under Federal control, in lieu of the 25 per cent advance. It further provided that the increase would apply but once where the charges on a continuous through movement were obtained by combination of separately established factors.

Some of the shipments moved entirely over lines which were under Federal control, but the majority of them moved partly over such lines and partly over noncontrolled lines, hereinafter called short lines. There were no joint through rates in effect, and charges were assessed on basis of the combination rates in effect June 24, 1918, plus 4.5 cents as added to the separate factors applicable over the lines under Federal control and either 4.5 cents or 25 per cent added to the factors published by the short lines. In every instance a tariff naming some one of the factors applicable over a federally controlled line handling the shipment carried a rule in substance providing that the increase of 4.5 cents would be applied but once to combinations of rates on through movements. The tariffs of the short lines did not so provide, nor did they refer to tariffs in which the rule was published.

The rates assessed are assailed as illegal to the extent that they exceeded the through combinations in effect June 24, 1918, plus 4.5 cents. Complainant contends that the publication of the combination rule in one of the tariffs used in making the combination rates on the through shipments constituted a holding out to the shipper of rates so [56] constructed which must be protected. The situation here, with respect to movements which were entirely over lines under Federal control is identical with that considered in *Sligo Iron Store Co. vs. W. N. Ry. Co.*, 62 I. C. C. 643.

As to the shipments which moved partly over short lines, defendants contend that since the through rates were based on combinations of factors published separately by the lines under Federal control and of the short lines, neither tariff carrying reference to the other, each factor of the combination was subject to the increase; that the Director-General had no control over the action of the short lines, which alone were responsible for the publication of their tariffs; and, on the other hand, that the short lines should not be bound by a rule published in the tariffs of the lines under federal control in which they did not concur.

The short lines neither published nor concurred in the combination rule and therefore were not subject to its provisions. But the rule as published by the lines under federal control was not limited in application to movements over such lines, and the Director-General must protect the basis of rates so offered to the public. The principle involved in

this situation cannot be distinguished from that announced in the Sligo case. In fact the precise question was decided in *Madison Lumber & Mill Co. vs. Director General*, 64 I. C. C. 699.

We find, following the cases cited, that the applicable rates on the shipments were those in effect June 24, 1918, plus 4.5 cents per hundred pounds; that the shipments were overcharged; that complainant made the shipments as described and bore the freight charges thereon; that it has been damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found applicable; and that it is entitled to reparation from the Director General [57] as agent, with interest. . . .”

I agree with plaintiff that the findings of the commission, learned and long experienced in the determination of the matters presented here, are entitled to great weight. It is alleged, and not denied by defendant, that the rule determinative of the case has been already passed on and remains unattacked, in many cases, in accord with plaintiff's contention here, that is, that the increase of 4.5 cents per hundred pounds should be added but once to the aggregate of the factors making up a combination rate on a through shipment, rather than to each separate factor. On this, plaintiff contends that under the peculiar facts of the case, [58] the exigencies of the situation in war emergency, with attendant informalities and express or constructive waiver of otherwise rigid rules, together with publication of

the so-called combination rule in some of the tariff schedules involved in each through movement, following on freight rate authority 96, made the matter of tariff determination as respects this and similar cases, one of fact and properly determined by the commission, or at best, one of mixed law and fact, with all possible weight to be given the decision of the commission. Defendant's contention is that tariff construction is purely a matter of law, citing Great Northern Railway Company, et al. vs. Merchants Elevator Company, 259 U. S. 285; and that the commission erred in its finding that the "combination rule" publication in one tariff bound the publisher to a tariff constructed on the basis of but one increase in the through rate, there being no "actual publication" of such a rate so increased, even by the line publishing it, and the "actually published" tariff being the only legal one. The lines not federally controlled did not publish nor concur in the combination rule, as the commission found, and for these reasons were held by the commission not to be bound by any construction under its terms. I am inclined to agree with plaintiff that the situation here was not that of ordinary usage, and that the method of applying the increase though termed by defendant a construction of tariff, was more a matter of fact for administration than of law. That there was lack of notice of release of factor lines from federal control, careful study by shippers to determine how the increase should be applied, with the determination, concurred in by

the western representative of the Director-General himself in answer to shippers' inquiries, and undisturbed for about a year, that the increase should be applied but once to the [59] aggregate factors; together with waiver of customary notices and other informalities under the stress of prevailing conditions; is shown by the record before the commission and exhibits introduced. If necessary to support the validity of the construction claimed by plaintiff under the combination rule, I hold that the publication of the rule, following freight rate authority 96, was in itself a sufficient publication to support the single increase, and under the attendant circumstances constituted a sufficient incorporation by reference to the tariffs of the connecting carriers to charge the line under federal control publishing such combination rule, with the tariff constructed as contended for by plaintiff as the legally published tariff, though not set out in actual figures. The case of Great Northern Railway Company vs. Merchants Elevator Company, 259 U. S. 285, stating the law of tariff construction, and cited by defendant to support the proposition that such construction is a matter of law, does not seem to me to require a different view of this case.

If the rates constructed as contended for by the plaintiff were the "legally published rates," then the finding of the commission that the shipments were "overcharged" because of exactions and payments in excess thereof, was correct according to defendant's own definition of the term.

The remaining point is as to the propriety of allowance of attorneys' fees and costs. It has been decided that interest and costs are proper. (*Missouri Pacific Railroad Co. vs. Ault*, 256 U. S. 554.) On construction of state statutes allowing attorneys' fees as costs, such costs have been sustained, and against the Director-General of Railroads, and it has also been held that the Director-General is in the position, in the state, of a private carrier in the suits authorized against him, as to [60] costs, interest and attorneys' fees, except where the award is made as a penalty. The allowance of a reasonable attorney fee is authorized as costs by the sections of the Interstate Commerce Act, 8 and 16, cited by defendant. Section 206 of the Transportation Act (41 Stat. 461; amended 42 Stat. 393) under which this action is authorized, merely provides for the general manner of proceeding and the party defendant. There is no negation of any rights which might have been had against the Director-General while federal control existed. By reference the costs authorized by the sections of the Interstate Commerce Act referred to are incorporated in the Transportation Act, and I think costs, interest and attorney fee as a cost, are properly allowable. I believe, however, that \$500 instead of the \$1,000 asked for is a reasonable attorney fee for the prosecution of this action.

It is therefore ordered that plaintiff have judgment as prayed against Andrew W. Mellon (Director-General of Railroads) as Agent, substituted for James C. Davis (Director-General of Railroads)

as Agent, as follows: \$590.47 with interest from November 1, 1919, at 6% per annum; \$79.34 with interest from May 15, 1919, at 6% per annum; \$2,149.59 with interest from January 15, 1919, at 6% per annum; \$152.05 with interest from March 22, 1920, at 6% per annum; \$923.46 with interest from April 1, 1919, at 6% per annum; \$420.11 with interest from November 15, 1919, at 6% per annum; \$447.90 with interest from January 15, 1919, at 6% per annum; \$968.18 with interest from May 1, 1919 at 6% per annum; \$928.23 with interest from July 1, 1919, at 6% per annum; together with an attorney's fee of \$500 to be taxed as costs, and together with costs to be taxed.

Dated: August 2, 1926.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Aug. 2, 1926. [61]

In the Southern Division of the District Court of
the United States, for the Northern District of
California, Second Division.

No. 17,264.

STANDARD OIL COMPANY (CALIFORNIA),
a Corporation,

Plaintiff,

vs.

ANDREW W. MELLON (Director-General of
Railroads) as Agent, Substituted for
JAMES C. DAVIS (Director-General of
Railroads) as Agent et al.,

Defendants.

DECISION.

This cause came on regularly for trial on the 27th day of August, 1926, before the Court sitting without a jury, a jury having been waived by written stipulation filed by the parties in the above-entitled action; Marshall P. Madison, representing Messrs. Pillsbury, Madison & Sutro, appearing for the plaintiff, and J. E. Lyons and Alex M. Bull appearing for the defendant James C. Davis (Director-General of Railroads) as Agent, for whom the defendant Andrew W. Mellon (Director-General of Railroads) as Agent has been substituted. Evidence both oral and documentary was introduced, and thereupon the cause was submitted to the Court for its decision, and now the Court being fully advised in the premises, and after having

fully considered said evidence, makes the following findings of fact and conclusions of law, to wit:

FINDINGS OF FACT.

I.

That the rates on file with the Interstate Commerce Commission, as of June 24, 1918, from and to the following points, [62] were as follows:

From	To	Rate	Commodity
Rochester, N. Y.	Colfax, Wash.	\$1.28	Petroleum Products.
El Segundo, Cal.	Holtville, Cal.	.63 $\frac{1}{2}$	Petroleum Products.
El Segundo, Cal.	Holtville, Cal.	.51 $\frac{1}{2}$	Engine (Naphtha) Distillate.
Ardmore, Okla.	Holtville, Cal.	1.11 $\frac{1}{2}$	Gasoline.
Dallas, Tex.	Holtville, Cal.	1.11 $\frac{1}{2}$	Gasoline.
Harrys, Tex.	Holtville, Cal.	1.11 $\frac{1}{2}$	Gasoline.
Cushing, Okla.	Holtville, Cal.	1.11 $\frac{1}{2}$	Gasoline.
Ardmore, Okla.	Calexico, Cal.	1.01 $\frac{1}{2}$	Petroleum Products.
Rochester, N. Y.	Willbridge, Ore.	1.28	Petroleum Products.
Salt Lake City, Utah	Yerington, Nev.	1.10 $\frac{1}{2}$	Petroleum Products.
Ardmore, Okla.	Yerington, Nev.	1.25 $\frac{1}{2}$	Gasoline.
Richmond, Cal.	Yerington, Nev.	.84	Petroleum Products.
Salt Lake City, Utah	Carson City, Nev.	.96 $\frac{1}{2}$	Petroleum Products.
Richmond, Cal.	Carson City, Nev.	.70	Petroleum Products.

From	To	Rate	Commodity
Sugar Creek, Mo.	Carson City, Nev.	1.09½	Petroleum Products.
Salt Lake City, Utah	Alturas, Cal.	1.20½	Petroleum Products.
Richmond, Cal.	El Portal, Cal.	.63½	Petroleum Products.
Richmond, Cal.	El Portal, Cal.	.42½	Engine (Naphtha) Distillate.
El Segundo, Cal.	Palm City, Cal.	.22	Engine (Naphtha) Distillate.
El Segundo, Cal.	Palm City, Cal.	.25	Petroleum Products.
El Segundo, Cal.	Santee, Cal.	.28½	Petroleum Products.
El Segundo, Cal.	Santee, Cal.	.24	Engine (Naphtha) Distillate.
Richmond, Cal.	Martell, Cal.	.25½	Engine (Naphtha) Distillate.
Richmond, Cal.	Martell, Cal.	.30½	Petroleum Products.
Ardmore, Okla.	Clarkdale, Ariz.	1.15½	Gasoline.
Ardmore, Okla.	Humboldt, Ariz.	1.08½	Gasoline.
Wichita Falls, Tex.	Humboldt, Ariz.	1.08½	Gasoline.
Fort Worth, Tex.	Clarkdale, Ariz.	1.15½	Gasoline.

increased four and one-half cents for the through continuous movement.

II.

That in amending the tariffs of rates on petroleum and petroleum products as set forth in plaintiff's petition to make effective the four and one-half cent advance referred to in Paragraphs V and VI of said petition, the carriers under federal control included in their tariffs a provision to the effect that when the charges on a continuous through movement are obtained by the combination of separately established rates, the increase of four and one-half cents per hundred pounds will apply as to the total of such combined rates in effect June 24, 1918 (some tariffs provided May 25, 1918), fifth class rates as increased June 25, 1918, not to be exceeded, and to the effect that said increase of [63] four and one-half cents per hundred pounds would not apply to each separately established rate.

III.

That the shipments made by plaintiff referred to in said petition were made pursuant to and in reliance upon the tariffs referred to in paragraphs V to VII, inclusive, in said petition, and particularly in reliance upon the provision referred to in the foregoing finding. That the rates charged and assessed by the defendant James C. Davis (Director-General of Railroads) as Agent, for whom the defendant Andrew W. Mellon (Director-General of Railroads) as Agent, has been substituted, for transporting the shipments of plaintiff hereinabove set

forth, were in excess of the lawful rates provided in said tariff, and more particularly of the provision in the foregoing finding referred to, in that the four and one-half cent advance was applied by the defendant James C. Davis (Director-General of Railroads) as Agent, for whom the defendant Andrew W. Mellon (Director-General of Railroads) as Agent, has been substituted, upon each separate factor contained in the combination of factors making the rate for the continuous through movement for the particular shipment in question in some cases, and in other cases the four and one-half cent advance was applied on one factor and a twenty-five per cent advance was applied on the other factor contained in the combination of factors making the rate for the continuous movement for the particular shipment in question, and said advances were not limited to a single four and one-half cent advance on the rate for the continuous through movement made from the combination of factors. That said charges were paid and borne by plaintiff herein.

IV.

That by reason of the facts contained in the foregoing finding, plaintiff was subjected to the payment of rates and charges for the transportation of the shipments referred to in [64] said petition, which said rates were, when exacted, in excess of the legally published rates and charges, in violation of Section 1 and Section 6 of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof and supplementary

thereto, and in violation of Section 10 of the Federal Control Act, and plaintiff was damaged thereby in the sum of \$6,659.33, together with interest thereon at the rate of six per cent (6%) per annum.

V.

That five hundred dollars (\$500) is a reasonable attorney's fee for the prosecution of this action.

VI.

That on the 16th day of January, 1924, the Yosemite Valley Railroad Company, one of the defendants named in the original order of the Interstate Commerce Commission hereinabove referred to, and subsequent to the making of such order, wrote a letter to the Interstate Commerce Commission, in the form and figures following, to wit:

“YOSEMITE VALLEY RAILROAD COMPANY

Operating and

Traffic Department

File

248

Merced, Calif., Jan. 16, 1924.

Mr. George B. McGinty, Secretary,
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

Please refer to order No. 12890, Standard Oil Company (California) v. Director General, as Agent, and Amador Central Railroad Co. et al.

In reading the decision in this case, it is my understanding that the Yosemite Valley Railroad

Company is not required to pay any amount of the overcharge which exists on shipments which moved over this line, and that the entire amount mentioned in the order, namely, \$968.18, is to be paid by the Director General. Please advise if my understanding in this matter is correct.

Very truly yours,

W. L. WHITE." [65]

VII.

That under date of February 12, 1924, the chief examiner of said Interstate Commerce Commission wrote a letter to said Yosemite Valley Railroad Company in the form and figures following, to wit:

"JJW-MEE

Feb. 12, 1924.

Mr. W. L. White,
General Manager,
Yosemite Valley Railroad Co.,
Merced, Calif.

Dear Sir:

Kindly refer to your letter of January 16, file 248, having reference to the Commission's reparation order issued in docket No. 12890.

On page 190 of the report there appears the following language:

'We find * * * that complainant made the shipments as described and bore the freight charges thereon; that it has been damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found ap-

plicable and that it is entitled to reparation from the Director General as Agent with interest.'

It would appear from the above quoted language that the Director General should pay the entire amount of the reparation order.

Very truly yours,

ULYSSES S. BUTLER,

Chief Examiner."

VIII.

That subsequent thereto and on or about the 20th day of February, 1925, said Yosemite Valley Railroad Company sent a telegram to the said chief examiner of said Interstate Commerce Commission, advising him that said order was erroneous to the extent that it included the short-line carriers involved therein, and calling attention to the fact that suit had been entered; and thereafter, and in response thereto, and under date of February 24, 1925, the chief examiner of the Interstate Commerce Commission sent a letter to plaintiff above named in the form and figures following, to wit: [66]

"JJW-IFH

INTERSTATE COMMERCE COMMISSION
Office of Chief Examiner
Washington

February 24, 1925.

Mr. S. G. Casade, Traffic Manager,
Standard Oil Company (California),
Standard Oil Building,
San Francisco, Calif.

Dear Sir:

The Commission is in receipt of a telegram from Mr. W. L. White, Manager, Yosemite Valley Railroad Company, advising that the Commission's order in docket No. 12890, Standard Oil Company of California v. Director General, as Agent, Amador Central Railroad Company, et al. is in error to the extent it includes the short line carriers involved therein.

An examination of the record and the Commission's opinion discloses that the reparation order in question should have been directed against the Director General solely. This is to advise you that an amended order will be issued in this case in conformity with the opinion at the earliest practicable date.

Very truly yours,
ULYSSES BUTLER,
Chief Examiner.

Copies to:

Mr. John F. Finerty,
Assistant General
Counsel United States
Railroad Administra-
tion,
Washington, D. C.

Mr. W. L. White, Gen'l
Mgr.,
Yosemite Valley Rail-
road Company,
Merced, Calif.

Mr. F. E. Murphy, Vice
Pres., Virginia &
Truckee Railway Co.,
Carson City, Nev.

Mr. F. O. Dolson,
Vice Pres., Holton In-
terurban Railway,
Riverside, Calif."

From the foregoing facts the Court finds the fol-
lowing conclusions of law: [67]

CONCLUSIONS OF LAW.

Plaintiff is entitled to judgment against the defendant Andrew W. Mellon (Director-General of Railroads) as Agent, substituted for James C. Davis (Director-General of Railroads) as Agent, as follows: \$590.47 with interest from November 1, 1919, at 6% per annum; \$79.34 with interest from May

Mr. T. J. Day,
General Freight Agent,
Pacific Electric Rail-
way, 670 Pacific Elec-
tric Bldg.,
Los Angeles, Calif.

Mr. P. H. Cook,
Traffic Manager,
Nevada Copper Belt Ry.
Co.,
Mason, Nev.

Messrs. Sanborn & Roehl,
Nevada - California - Ore-
gon Ry.,
San Francisco, Calif.

Mr. D. W. Pontius, Gen'l
Mgr.,
San Diego & Arizona R.
R. Co.,
San Diego, Calif.

15, 1919, at 6% per annum; \$2149.59 with interest from January 15, 1919, at 6% per annum; \$152.05 with interest from March 22, 1920, at 6% per annum; \$923.46 with interest from April 1, 1919, at 6% per annum; \$420.11 with interest from November 15, 1919, at 6% per annum; \$447.90 with interest from January 15, 1919, at 6% per annum; \$968.18 with interest from May 1, 1919, at 6% per annum; \$928.23 with interest from July 1, 1919, at 6% per annum; together with an attorney's fee of \$500 to be taxed as costs, and together with costs to be taxed.

Dated: San Francisco, California, October 11th, 1926.

ST. SURE,
District Judge.

Receipt of a copy of the within decision is hereby admitted this 11th day of October, 1926.

A. M. BULL,
J. E. LYONS,
Attorneys for Deft. Mellon.

[Endorsed]: Filed Oct. 11, 1926. [68]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 17,264.

**STANDARD OIL COMPANY (CALIFORNIA),
a Corporation,**

Plaintiff,

vs.

ANDREW W. MELLON (Director-General of Railroads) as Agent, Substituted for JAMES C. DAVIS (Director-General of Railroads) as Agent,

Defendant.

JUDGMENT ON FINDINGS.

This cause having come on regularly for trial upon the 26th day of August, 1925, before the Court sitting without a jury; a trial by jury having been specially waived by written stipulation filed; Marshall P. Madison, Esq., appearing as attorney for plaintiff; and James E. Lyons, Esq., and Alex M. Bull, Esq., appearing as attorneys for defendant; and the trial having been proceeded with on the 27th day of August, 1925, and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having rendered its decision and filed its findings and

ordered that judgment be entered in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Standard Oil Company (California), a corporation, plaintiff, do have and recover of and from Andrew W. Mellon (Director-General of Railroads) as Agent, substituted for James C. Davis (Director-General of Railroads) as Agent, defendant, as follows: \$590.47 with interest from November 1, 1919, at 6% per annum; \$79.34 with interest from May 15, 1919, at 6% per annum; \$2,149.59 with interest from January 15, 1919, at 6% per annum; \$152.05 with interest from March 22, 1920, at 6% per annum; \$923.46 with interest from April 1, 1919, at 6% per annum; \$420.11 with interest from November 15, 1919, at 6% per annum; \$447.90 with interest from January 15, 1919, at 6% per annum; \$968.18 with interest from May 1, 1919 at 6% per annum; \$928.23 with interest from July 1, 1919, at 6% per annum; together with attorney's fee of \$500.00 to be taxed as costs, and together with its costs herein expended, taxed at \$28.60.

Judgment entered October 11th, 1926.

WALTER B. MALING,

Clerk. [69]

[Title of Court and Cause.]

STIPULATION RELATIVE TO MATTERS TO BE INCLUDED IN AND OMITTED FROM BILL OF EXCEPTIONS.

WHEREAS, Defendant's Exhibit "B" before the Court included a copy of the complaint before the Interstate Commerce Commission, all the answers of the corporate defendants and that of the Director-General of Railroads; that inasmuch as a copy of said complaint is annexed to the petition filed in the United States District Court, reference to which is hereby made for further particulars, it is hereby stipulated and agreed that a copy of said complaint before the Interstate Commerce Commission and of the answers of the individual defendants who were dismissed may be omitted from the copy of said Exhibit "B" to be included in the bill of exceptions.

AND WHEREAS, said Exhibit "B" before the Court also included Complainant's Exhibits Nos. 1 to 17 inclusive before the Interstate Commerce Commission, which were all statements showing rates and tariff authority relied on by complainant for the rates claimed applicable on complainant's shipments; and whereas, Defendant's Exhibits "E" and "F" before the Court are photostatic copies covering typical instances of the rates involved from which the [70] contentions of the parties can be shown and it being conceded by defendant Mellon that (except for his claim of defective or nonservice

of process as to shipments moving over federal controlled lines other than Southern Pacific Company) if the Court holds that the order of the commission is valid, the plaintiff will be entitled to recover the full amount of the commission's order and will recover nothing if the order is held to be invalid, it is therefore, agreed that Complainant's Exhibits Nos. 1 to 17 inclusive, before the Interstate Commerce Commission may be omitted from the bill of exceptions as immaterial.

IT IS HEREBY STIPULATED that said Defendant's Exhibit "C" before the Court consisted of the complainant's Rule V statement and Defendant's Exhibit "D" consisted of an analysis of said Rule V statement; that said Exhibits "C" and "D" are exceedingly voluminous and need not be included in the bill of exceptions or printed in the transcript.

IT IS FURTHER STIPULATED that all of the original exhibits on file in the United States District Court may be transmitted by the Clerk thereof to the Appellate Court, and that either party may refer to any original exhibit which is omitted from the bill of exceptions, with like effect as if the same were included in the bill of exceptions and printed in the transcript.

Dated: San Francisco, California, November 1, 1926.

PILLSBURY, MADISON & SUTRO,
ALEX. M. BULL,
JAMES E. LYONS,
Attorneys for Plaintiff.

Attorneys for Defendant, Andrew W. Mellon (Director-General of Railroads) as Agent.

[Endorsed]: Filed Nov. 3, 1926. [71]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that the above-entitled case came on regularly for trial before the Honorable A. F. St. Sure, Judge of the above-entitled court, sitting without a jury, a jury having been duly waived in writing, on August 26, 1925, at the hour of ten o'clock A. M., and was proceeded with on August 27th, 1925, and the following proceedings were had:

Counsel for plaintiff offered and there was received in evidence Plaintiff's Exhibit No. 2, in words and figures as follows:

PLAINTIFF'S EXHIBIT No. 2.

GENERAL ORDER No. 28.

Washington, D. C., May 25, 1918.

Whereas it has been found and is hereby certified to the Interstate Commerce Commission that in order to defray the expenses of Federal control and

operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to [72] increase the railway operating revenues, and

Whereas the public interest requires that a general advance in all freight rates, passenger fares, and baggage charges on all traffic carried by all railroad and steamship lines taken under Federal control under an act of Congress approved August 29, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," shall be made by initiating the necessary rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission under authority of an act of Congress approved March 21, 1918, entitled "An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes."

Now, therefore, under and by virtue of the provisions of the said act of March 21, 1918, it is ordered that all existing freight rates, passenger fares, and baggage charges, including changes heretofore published but not yet effective, on all traffic carried by all said railroad and steamship lines under Federal control, whether the same be carried entirely by railroad, entirely by water, or partly by railroad and partly by water, except traffic carried entirely

by water to and from foreign countries, be increased or modified, effective June 25, 1918, as to freight rates and effective June 10, 1918, as to passenger fares and baggage charges, to the extent and in the manner indicated and set forth in the "Exhibit" hereto attached and made part hereof, by filing schedules with the Interstate Commerce Commission effective on not less than one day's notice.

Given under my hand this the 25th day of May, 1918.

W. G. McADOO,
Director General of Railroads. [73]

FREIGHT RATES.

Section 1.—Class Rates (Domestic).

(a) All interstate class rates shall be increased twenty-five (25) per cent.

(b) All intrastate class rates shall be increased twenty-five (25) per cent where there are no interstate class rates published between the same points, and shall be governed by the classification, viz.: Official classification, southern classification, or western classification, exceptions thereto and minimum weights which generally govern the interstate rates in the same territory, except that the Illinois classification will be used between points in the State of Illinois.

(c) All intrastate class rates shall be canceled where there are interstate class rates published between the same points and the interstate rates as increased by paragraph (a) shall apply.

(d) After such increase of twenty-five (25) per cent no rate shall be applied on any traffic moving under class rates lower than the amounts in cents per 100 pounds for the respective classes as shown below for the several classifications.

* * * * *

Section 2.—Commodity Rates (Domestic).

(a) Interstate commodity rates on the following articles in carload shall be increased by the amounts set opposite each: (Does not include petroleum and petroleum products).

* * * * *

(v) Interstate Commodity rates not included in the foregoing list shall be increased twenty-five (25) per cent.

* * * * *

GENERAL.

Section 20.

Where the Interstate Commerce Commission prior to the date [74] hereof has authorized or prescribed rates, fares, and charges, which have not been published at the date of this order, the rates, fares, or charges initially established hereunder by applying the increases herein prescribed to the existing or published rates, fares, or charges may be subsequently revised by applying the increases prescribed herein to the rates, fares, and charges so authorized or prescribed by the Interstate Commerce Commission.

Section 21.

All schedules, viz., tariffs and supplements, published under the provisions of this order shall bear on the title-page the following, in bold-face type:

"The rates made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to both interstate and intrastate traffic.

"This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918."

SUPPLEMENT No. 1 TO GENERAL ORDER
No. 28.

Washington, D. C., June 12, 1918.

It is ordered that General Order No. 28, be, and the same is hereby, supplemented by amending the terms and provisions of the exhibit attached thereto as follows:

Paragraphs (b) and (c) of section 1, paragraphs (c) and (d) of section 2, and paragraph (b) of section 4 are canceled.

Paragraph (a) of section 1 is amended to read as follows:

* * * * *

Counsel for plaintiff offered and there was received in evidence Plaintiff's Exhibit No. 3, in words and figures as follows: [75]

PLAINTIFF'S EXHIBIT No. 3.

YOSEMITE VALLEY RAILROAD COMPANY.
Operating and Traffic Department.File
248

Merced, Calif., Jan. 16, 1924.

Mr. George B. McGinty, Secretary,
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

Please refer to order No. 12890, Standard Oil Company (California) vs. Director General, as Agent, and Amador Central Railroad Co. et al.

In reading the decision in this case, it is my understanding that the Yosemite Valley Railroad Company is not required to pay any amount of the overcharge which exists on shipments which moved over this line, and that the entire amount mentioned in the order, namely, \$968.18, is to be paid by the Director General. Please advise if my understanding in this matter is correct.

Very truly yours,

W. L. WHITE. [76]

COPY.

JJW-MEE

Feb. 12, 1924.

Mr. W. L. White, General Manager,
Yosemite Valley Railroad Co.,
Merced, Calif.

Dear Sir:

Kindly refer to your letter of January 16, file

248, having reference to the Commission's reparation order issued in Docket No. 12890.

On page 190 of the report there appears the following language:

"We find * * * that complainant made the shipment as described and bore the freight charges thereon; that it has been damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found applicable and that it is entitled to reparation from the Director General, as Agent, with interest."

It would appear from the above-quoted language that the Director General should pay the entire amount of the reparation order.

Very truly yours,

ULYSSES S. BUTLER,

Chief Examiner. [77]

Plaintiff thereupon rested its case.

WHEREUPON, counsel for defendant James C. Davis, offered and there was received in evidence, Defendant's Exhibits "A," "B," "C," "D," "E," "F," "G," and "H," in words and figures,—with the exception of omissions hereinafter mentioned—as follows:

STATEMENT OF MATTERS OMITTED FROM BILL OF EXCEPTIONS.

(N. B. A copy of the complaint before the Interstate Commerce Commission being annexed to the petition filed in the United States District Court, reference to which is hereby made for further par-

ticulars, same is therefore omitted from this bill of exceptions upon stipulation. The answers, filed with the Interstate Commerce Commission, of the corporate defendants who were dismissed, Complainant's Exhibits Nos. 1 to 17, inclusive, before the Interstate Commerce Commission, which were all statements showing rates and tariff authority relied on by complainant for the rates claimed to be applicable on complainant's shipments, being a portion of Defendant's Exhibit "B" before the Court, Defendant's Exhibit "C" before the Court, consisting of complainant's Rule V statement, and Defendant's Exhibit "D" before the Court, consisting of an analysis of said Rule V statement, are omitted from this bill of exceptions for the sake of brevity upon stipulation of the parties.

All of the original exhibits before the United States District Court are to be transmitted by the Clerk thereof to the Appellate Court upon stipulation that either party may refer to any of said exhibits which are omitted from the bill of exceptions with like effect as if the same were included in this bill of exceptions and printed in the transcript.)

[78]

DEFENDANTS' EXHIBIT "A."
UNITED STATES OF AMERICA.

In the Southern Division of the United States District Court for the Northern District of California.

Action Brought in said District Court, and the Complaint Filed in the Office of the Clerk of said District Court, in the City and County of San Francisco.

PILLSBURY, MADISON & SUTRO,
Plaintiffs Attorneys.

STANDARD OIL COMPANY, a Corp.,
Plaintiff,
vs.

JAMES C. DAVIS (Director General of Railroads), as Agent, et al.,
Defendants.

The President of the United States of America,
GREETING: To James C. Davis (Director General of Railroads) as Agent, Amadore Central Railroad Company, a Corp., Holton Inter-Urban Railway Company, a Corp., Nevada Copper Belt Railroad, a Corp., Nevada-California-Oregon Railway, a Corp., Pacific Electric Railway Company, a Corp., Virginia & Truckee Railway, a Corp., San Diego and Arizona Railway Company, a Corp., Yosemite Valley Railroad Company, a Corp., Defendants.

You are hereby directed to appear and answer

the complaint in an action entitled as above, brought against you in the Southern Division of the United States District Court for the Northern District of California, within ten days after the service on you of this summons, if served within this county, or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

Witness the Honorable JOHN S. PARTRIDGE, Judge of said District Court, this 14th day of February, in the year of our Lord one thousand nine hundred and twenty-five, and of our Independence the one hundred and forty-ninth.

[Seal]

WALTER B. MALING,
Clerk.

By A. C. Aurich,
Deputy Clerk.

A true copy.

Attest:

WALTER B. MALING,
Clerk.

By A. C. Aurich.

[Endorsed]: Filed 8/27/25.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of Calif.,—ss.

I hereby certify and return that I served the annexed summons on the therein named Jas. C. Davis (Director Genl. of R. Roads) as agent by handing to and leaving a true copy thereof together with copy of complaint attached with E. A. Van Wynan, statutory agent of Southern Pacific RR. Co. personally at city and Co. of S. F. in said district on the 17th day of Feby., A. D. 1925.

FRED L. ESOLA,
U. S. Marshal.
H. T. Curtiss,
Deputy.

Filed Feb. 26, 1925. Walter B. Maling, Clerk.
By A. C. Aurich, Deputy Clerk. [79]

DEFENDANTS' EXHIBIT "B."

INTERSTATE COMMERCE COMMISSION.
Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Complaint filed February 26, 1921,
Answers of defendants,
Transcript of the stenographer's notes of the hearing held November 4, 1921, at San Francisco, California, before Examiner C. R. Seal,
Exhibits filed at said hearing, and

Letter received subsequent to the hearing referred to on pages 52 and 53 of the transcript,

in case No. 12,890, Standard Oil Company (California) vs. Director General as Agent, Amador Central Railroad Company et al., the originals of which are now on file and of record in the office of this Commission.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Commission this 14th day of August, A. D. 1925.

(Seal of the Interstate Commerce Commission)

GEORGE B. McGINTY,

Secretary of the Interstate Commerce Commission.

[80]

BEFORE THE INTERSTATE COMMERCE
COMMISSION.

I. C. C. Docket No. 12,890.

STANDARD OIL CO. (CALIFORNIA)

vs.

DIRECTOR GENERAL et al.

ANSWER OF JAMES C. DAVIS, DIRECTOR
GENERAL OF RAILROADS, AS AGENT
UNDER THE TRANSPORTATION ACT.

For answer to the complaint or so much thereof as he is advised it is necessary for him to answer, this defendant says:

1. He avers that he is Agent under the Transportation Act and as such is exercising the powers vested in and duties assigned him.

2. He admits that prior to his designation as Agent, John Barton Payne was Agent or Director General of Railroads and as such exercised the powers vested in and the duties assigned to him.

3. He refers to the tariffs named in the complaint and to all other tariffs applicable for a correct statement of the rates referred to or complained of herein.

4. He says that there was made the Director General's Order No. 28, effective June 25, 1918, and he avers that it was therein found by the Director General and certified to this Commission that in order to defray the expenses of Federal control and operation, fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers operating as a unit, it was necessary to increase the railway operating revenue; also that in the Director General's opinion the public interest required a general advance in freight rates, passenger fares and baggage charges, as therein provided. [81]

5. He denies that he, as Agent, or his predecessor, either as Agent or as Director General, has violated or is violating any section of the Act to Regulate Commerce, or Section 10 of the Federal Control Act, as alleged in the complaint, or that anything done or omitted by him, as Agent, or his predecessor, as Director General, or as Agent, with respect to the subject matter of said complaint, is in violation of law, or that he should be subjected to any adverse order, and he denies that the com-

plainant has been in any way damaged or is entitled to the relief prayed or to any other relief.

6. Each and every allegation in the complaint touching anything alleged to have been done or omitted to be done by him as Agent or his predecessor as Director General or as Agent, not hereinbefore admitted or denied, is hereby specifically denied.

And having fully answered he prays that the complaint be dismissed.

JAMES C. DAVIS,
Agent.

By JOHN F. FINERTY,
Assistant General Counsel United States Railroad
Administration.

Washington, D. C., July 11, 1921. [82]

OFFICIAL STENOGRAPHERS' MINUTES
Before the
INTERSTATE COMMERCE COMMISSION.
Docket No. 12,890.

STANDARD OIL COMPANY (California),
Complainant,
vs.

DIRECTOR GENERAL, as Agent, AMADOR
CENTRAL RAILWAY COMPANY, et al.,
Defendants.

At San Francisco, California, Date November 4,
1921.

Communication Regarding this Transcript Should
be Addressed to New York Office.

THE STATE LAW REPORTING COMPANY,
Official Reporters,
Woolworth Building,
New York City, N. Y. [83]

Before the INTERSTATE COMMERCE COMMISSION.

Docket No. 12,890.

STANDARD OIL COMPANY (California),
Complainant,
vs.

DIRECTOR GENERAL, as Agent, AMADOR
CENTRAL RAILWAY COMPANY, et al.,
Defendants.

San Francisco, Calif., Nov. 4, 1921.
2:00 o'clock P. M.

Before: C. R. SEAL, Examiner.
Met pursuant to notice.

Appearances:

W. O. BANKS and W. B. ROBERTS, Standard
Oil Building, San Francisco, California, Ap-
pearing for Complainant.

HAVEN, AATHERN, CHANDLER & FARMER,
San Francisco, California, Appearing for the
Amador Central Railway Company, Defend-
ant.

CHARLES D. MAHAFFIE, Hurley Wright
Building, Washington, D. C., Appearing for
the Director General, Defendant.

ELMER WESTLAKE, 841 Southern Pacific Building, 65 Market Street, San Francisco, California, Appearing for Director General, Nevada Copper Belt Railroad Company, Virginia & Truckee Railway Company, Southern Pacific [84—1] Company, Yosemite Valley Railroad Company, Pacific Electric Railway Company, and San Diego & Arizona Railway Company, Defendants.

SANBORN & ROEHL, Balfour Building, San Francisco, California, Appearing for the Nevada-California-Oregon Railway Company, Defendant. [85—2]

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INFORMATION TO BE FURNISHED.

Circular of Railroad Commission of California (By Mr. Roehl)	18
Date of relinquishment from Federal control of certain carriers (By Mr. Westlake)	52, 53
[86—3, 4]	

PROCEEDINGS.

Exam. SEAL.—The next case assigned for this time and place is Docket No. 12890, Standard Oil Company (California), versus Director-General, as Agent, Amador Central Railroad Company, et al. Who appears for complainant?

Mr. BANKS.—W. O. Banks and W. B. Roberts.

Exam. SEAL.—And for the defendant?

Mr. FARMER.—For the Amador Central Railroad Company, Haven, Athearn, Chandler & Farmer. Farmer is my name. The other defendants are represented, I understand, by Mr. Roehl.

Mr. MAHAFFIE.—Charles D. Mahaffie for the Director-General.

Mr. WESTLAKE.—Elmer Westlake of the DirectorGeneral and the Nevada Copper Belt and the Virginia & Truckee; also for the Southern Pacific and the Yosemite Valley Railroad. I have no direct authority to represent any of the other corporate defendants. I assume their interests will be more or less mutual and probably more or less similar testimony would apply to all of them.

Exam. SEAL.—Are there any other appearances?

Mr. ROEHL.—Sanborn & Roehl, by A. B. Roehl, for the Nevada-California-Oregon Railroad.

Exam. SEAL.—The complaint alleges that the rates charged complainant for the transportation of petroleum [87—5] products in carloads shipped during the period August 1, 1918, to, and including, February 29, 1920, from and to the points named in paragraph 5 of, and in Exhibit "A" to the complaint were in excess of the legally published rates and charges and were in violation of section 6 of the Interstate Commerce Act and section 10 of the Federal Control Act, in that the increase of 4.5 cents per 100 pounds to the rates in effect May 25, 1918, authorized by Freight Rate Authority No. 96, was applied by defendants to the factors used in constructing the rates for the through movement instead of to the aggregate of such factors.

The commission is asked to award reparation.

Is that a correct statement of the issues, Mr. Banks?

Mr. BANKS.—I believe it is.

Exam. SEAL.—You may proceed with your case.

Mr. WESTLAKE.—I should like to add the following railroads as those for whom I appear: The Pacific Electric Railway Company and the San Diego & Arizona Railway Company.

Mr. FARMER.—If there is no objection from anyone I would like to put in proof of the fact that the Amador Central Railroad Company, one of the defendants here, is sued here only on intrastate transactions, and that that railroad was not under the control of the Director-General [88—6] of Railroads at the time of any of the transactions represented here, and that its rates were those

charged—upon the shipments here involved, were those established by the Railroad Commission of the State of California, and that there were no common rates between the Southern Pacific and the Amador Central as to any of these shipments at any of those times. With that I am willing to submit the matter, as far as the Amador Central Railroad is concerned, upon the point that there was no jurisdiction in the Interstate Commerce Commission as against the Amador Central Railroad Company upon any of the transactions here involved, and to ask leave to withdraw from further presentation of the matter.

Exam. SEAL.—The rates of the Amador Central were not initiated by the Director-General?

Mr. FARMER.—Only in this way: The Railroad Commission of the State of California, following the issuance of General Order 28, made an order in July, 1918, adopting and establishing for all carriers in the State of California the 25 per cent increase which had been ordered by the Director-General in June, 1918.

Exam. SEAL.—That is, adopting it as to carriers not under federal control?

Mr. FARMER.—Yes, and that named the established rate in California, so far as the Railroad Commission of the [89—7] State of California was concerned, at all times involved in the transactions recited in this complaint, and was never reduced to conform with the 4.5 cent equalizing rate or order which is involved in this complaint. Hence the Amador Central had no legal authority to charge anything less than the rate which it in

fact did charge, which is as set up in this bill of complaint. I will establish those facts, very briefly, if I may.

Exam. SEAL.—Do you want to take the stand now or wait until the complainant has finished its case?

Mr. FARMER.—I would like to put in the proof now.

Exam. SEAL.—It is a little out of order now.

Mr. FARMER.—I admit that, but there is no reason why we should listen to all these questions here upon points where we think the jurisdiction of the commission does not exist.

Mr. ROEHL.—I think that condition obtains, Mr. Examiner, with respect to a number of short lines. I know it does with respect to the Nevada-California-Oregon Railroad.

Exam. SEAL.—All these are intrastate transactions, are they?

Mr. ROEHL.—Yes. In other words, at the time the increase of 25 per cent was authorized on June 25, 1918, there were no joint rates for the intrastate transportation [90—8] of oil between points on the Nevada-California-Oregon Railway and other points reached on its connections. That oil was transported on combination of local rates to and from the junction point, and the movements as set out in the complaint as having taken place over the Nevada-California-Oregon Railway were movements between Alturas, a point in California, to Wendel, the connection with the Southern Pacific Company, which is in California and which ship-

ments moved on strictly local rate, or combination of a California rate, an intrastate rate.

Exam. SEAL.—On those movements, then, I take it the 4.5 cent increase was applied by the road not under federal control and also by the federal-controlled road.

Mr. ROEHL.—No, sir, the 4.5 cent increase was applied by the road under federal control, but the road not under federal control continued to apply the 25 per cent increase; in other words, the situation was this, Mr. Examiner:

That at the time of the promulgation of General Order 28 the Nevada-California-Oregon Railway was presumably under federal control. Subsequently to the increase of rates established by General Order 28 the Nevada-California-Oregon Railway was specifically released from federal control by Director-General Payne. It therefore was not subject to the subsequent orders of the Railroad [91—9] Administration.

Exam. SEAL.—You mean the order of establishing the 4.5 cent advance in lieu of the 25 per cent advance?

Mr. ROEHL.—Yes, and it continued the 25 per cent increase, and it never adopted the rule for the application of the 4.5-cent increase to the combination of the through rate as promulgated by the United States Railroad Administration after the date on which the N-C-O was released from federal control.

Exam. SEAL.—Its tariff did not carry that rule?

Mr. ROEHL.—No, sir.

Exam. SEAL.—Well, if there is no objection I suppose Mr. Farmer may proceed. You have no objection?

Mr. BANKS.—No, I have no objection.

Mr. ROBERTS.—Our position in this matter, Mr. Examiner, is that the rules named in the tariffs of the lines that were under federal control authorized the application of the through combination of rates in effect June 24, 1918, plus 4.5 cents, whether one of the factors was named in an N-C-O or any other tariff.

Exam. SEAL.—That is, where the movement occurred partly over the federal controlled and partly over the nonfederal controlled line?

Mr. ROBERTS.—Yes, our position is that that made no difference, according to the tariffs of the carriers. [92—10]

Mr. ROEHL.—Mr. Examiner, counsel certainly cannot contend that the N-C-O would be bound by a rule of a tariff to which it was not a party.

Exam. SEAL.—Off the record (discussion).

TESTIMONY OF J. A. McPHERSON.

J. A. McPHERSON was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. FARMER.) What is your occupation, Mr. McPherson?

A. Superintendent of the Amador Central Railroad.

Q. That is one of the defendants in this docket, No. 12890? A. Yes.

Q. Were you such superintendent during all the time following June, 1918? A. Yes.

Q. (By Exam. SEAL.) Where is the Amador Central Railroad?

A. Connects with the Southern Pacific at Ione.

Q. (By Mr. FARMER.) Ione, California?

A. Ione, California.

Q. That is in Amador County?

A. Amador County.

Q. It is a line that is situated entirely within the State of California, is it?

A. It is situated entirely within the State of California. [93—11]

Q. Have you examined the items specified on the last page of the bill in this case relative to shipments from Richmond, California, to Martell, California? A. I have.

Q. Do you know whether these points named, Richmond, California, and Martell, California, are both within the State of California?

A. They are.

Q. And all shipments and movements of freight between those two points are still within the State of California? A. They are.

Q. Martell, California, is a point upon the Amador Central Railroad? A. It is the terminal.

Q. It is the terminal? A. Yes.

Q. At what point on the Amador Central Railroad do you connect with the Southern Pacific Company on these shipments? A. At Ione.

Q. So that that carrier carried these items speci-

fied on this last page of the complaint from Ione, California, to Martell?

A. To Martell, California.

Q. Now, state whether or not your railroad, that is, the [94—12] Amador Central Railroad Company, was taken over by the Director-General on or about June, 1918?

A. It was taken over the first day of January, 1918, along with all other railroads.

Q. The first day of January, 1918?

A. Yes, sir.

Q. What was thereafter done by the Director-General in reference to the Amador Central Railroad?

A. Well, that General Order 28 was issued increasing all tariffs 25 per cent. That tariff was filed on the 25th day of June, 1918.

Q. (By Exam. SEAL.) Was your road under federal control at that time, the Amador Central?

A. It was under federal control at that time, yes.

Q. At the time of this increase initiated by the Director-General? A. Yes, sir.

Q. (By Mr. FARMER.) When was the Amador Central released from federal control?

A. Released on June 30, 1918.

Q. Three days after the Order No. 28?

A. Five days.

Q. What was done by the Railroad Commission of the State of California when this advance of 25 per cent increased the tariffs, if you know? [95—13]

A. There was a circular letter issued by the rate expert, I believe, of the Railroad Commission, authorizing the filing of those tariffs, or increases, rather.

Q. Those 25 per cent increases?

A. The 25 per cent increases.

Q. What was the date?

A. That was dated July 17th.

Q. July 17th, 1918?

A. And on the 22d of July we filed the increased tariff with the California Railroad Commission.

Q. (By Exam. SEAL.) And the increase, was that the 25 per cent or the 4.5 cent advance?

A. 25 per cent.

Q. (By Mr. FARMER.) When was this 4.5 cent order made by the Director-General, if you know, the Traffic Bureau of the Director-General?

A. I think that was made sometime in August.

Q. At any rate, it was after the Amador Central had been released from federal control, was it?

A. Yes.

Q. And after the Railroad Commission of the State of California had authorized this 25 per cent increase? A. Yes, sir.

Q. Now, then, referring to these shipments which are referred to on the second, the last page of this bill, [96—14] will you state whether or not the tariff charged by the Amador Central upon those shipments was based upon this 25 per cent increase authorized by the Railroad Commission of the State of California in July, 1918? A. They were.

A. They were.

Q. It was? A. Yes.

Q. Did the Railroad Commission of the State of California ever during the time of these shipments decrease that rate? A. Never touched it.

Q. So that the rate actually charged by the Amador Central for the shipments here involved between Richmond and Martell was the regular filed rate with the Railroad Commission of the State of California? A. Yes.

Q. Had you any agreement of any kind with the Southern Pacific Company relative to joint tariffs for petroleum of any kind?

A. None whatever.

Q. None whatsoever?

A. No joint tariffs with the Southern Pacific whatever.

Mr. FARMER.—That is all.

Q. (By Exam. SEAL.) Did the 25 per cent increase originally become effective on June 25, 1918, or at a later date? [97—15]

A. It became effective on June 25, 1918.

Q. (By Mr. FARMER.) You mean by that that you adopted it as of that date?

A. As of that date.

Q. (By Exam. SEAL.) Were you under federal control at that time? A. At that time, yes.

Q. And increased your rates along with those of other carriers under federal control? A. Yes, sir.

Q. And later, after your road was released, the Railroad Commission of California confirmed that?

A. Confirmed that tariff, or increase rather.

Q. Have you reference to your tariffs which named

the rates on the commodities, or the rates in effect when these shipments moved?

A. Well, takes fifth class rate, Western Classification, and our fifth class rate was 9 cents previous to the increase, and the increase raised it to 11.5 cents, and that was the rate charged.

Q. 11.5 cents? A. Yes, per 100 pounds.

Q. Was that tariff filed with the Interstate Commerce Commission?

Q. (By Mr. FARMER.) Can you answer that question, whether [98—16] that tariff which had been ordered by the Railroad Commission, was filed with the Interstate Commerce Commission?

A. The original supplement was, yes—the increase of 25 per cent was filed with the Interstate Commerce Commission.

Q. (By Exam. SEAL.) Can you give me the I. C. C. number of it?

A. Let me have that tariff. (Tariff handed to witness.)

A. It was our original tariff. There is the original Tariff, 1-B, I. C. C. No. 5, filed back in June of 1914. This (indicating) makes the increase.

Q. The increase of June 25, 1918, was carried in supplement No. 3 to your—

A. (Interrupting.) That is the California supplement. This is a special supplement issued under General Order 28 covering increases to Tariff 1-B.

Exam. SEAL.—Any cross-examination?

Mr. BANKS.—No questions.

Q. (By Mr. ROEHL.) I would like to ask Mr. McPherson a question. Was the circular of the

Railroad Commission a circular of general application in the State of California?

A. Yes, I believe it was California only. They would only have jurisdiction over California. [99—17]

Q. But what I mean, it applied to all roads operating wholly within the State of California. That was correct was it?

A. I don't know that I am in position to answer that.

Q. Have you got a copy of that circular letter?

A. No, I have not. It was a circular letter issued by the California commission under date of July 17, 1918.

Q. And that circular letter confirmed or authorized the rates theretofore established under General Order 28 by the railroads which had been relinquished, is that right? A. That was it.

Mr. ROEHL.—I would like the privilege of presenting and filing a copy of that circular of the Railroad Commission of the State of California later in this case. I have not one at the present time. I can obtain one if the Examiner will consent to receive it.

Exam. SEAL.—Yes, that may be filed within fifteen days.

Q. (By Mr. WESTLAKE.) The only reason you needed the authority of the California Railroad Commission in confirmation of the 25 per cent increase was because of June 30, 1918, your road was relinquished from federal control?

Mr. FARMER.—I think that is a conclusion of law.

Mr. WESTLAKE.—It is to your advantage. If you want [100—18] that withdrawn and object to it I will withdraw it.

Mr. FARMER.—I think it is a question of law purely.

Mr. WESTLAKE.—I will withdraw the question.

Exam. SEAL.—That might be the inference drawn from the facts that you presented. Off the record (discussion).

A. Yes.

Exam. SEAL.—Witness excused.

(Witness excused.)

Mr. FARMER.—Thank you very much.

Exam. SEAL.—You may proceed, Mr. Banks.

TESTIMONY OF W. B. ROBERTS.

W. B. ROBERTS was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. BANKS.) Please state your name and occupation.

A. W. B. Roberts, Assistant Traffic Manager, Standard Oil Company, San Francisco.

Q. What experience have you had in traffic matters, Mr. Roberts?

A. I have had about twelve years experience with the railroads, interpreting tariffs and applying rates, and fourteen years' experience along the same lines with the Standard Oil Company.

Q. Will you please state in a general way on what your contention in this case is based? [101—19]

A. The shipments involved in this complaint consisted of petroleum and petroleum products, classified fifth class in the current Western Classification. There were no through rates published to apply, the rates being based on combination of different factors found in different tariffs.

The question is whether the applicable rates should have been constructed by the addition of a single increase to the combination of the factors in effect June 24, 1918.

Q. Was that provision carried generally in the tariffs of lines that were under federal control?

A. There was a provision in the tariffs, yes.

Q. (By Exam. SEAL.) In each of the controlled lines over which these shipments moved?

A. Some of the shipments moved, I believe, wholly over the lines that were under federal control, and some of them moved partly over federal-controlled lines, and partly over nonfederal-controlled lines.

Q. But in every case the line under federal control carried in its tariff the combination rule, as I understand your statement?

A. That is the case, yes.

Q. (By Mr. BANKS.) One of the tariffs naming the factors carried such a provision? A. Yes, sir.

Q. Have you prepared any exhibits showing reference to [102—20] these shipments and tariff authorities?

A. Yes, I have had prepared under my supervision, an exhibit of each shipment, showing each shipment, the point of origin, destination, the date of shipment, car initial and number, and route, together with full tariff authority, giving reference to the publications containing prescribed methods of arriving at the rates as contended for. I would like to introduce these exhibits rather than to read all the tariff references into the record.

Exam. SEAL.—I would prefer for you to do that.

Q. (By Mr. ROEHL.) Would you mind if you let us look at that for a moment?

A. Yes, that is simply of the first one.

Mr. BANKS.—I think it would be best to read these lists off and then refer to them as you come to them.

A. I intend to read each one saying from and to what points shipments moved.

Exam. SEAL.—Off the record (discussion).

Mr. BANKS.—These exhibits were prepared to show points of origin and destination of all the shipments involved in this complaint, together with the routes and the rates and the full tariff authority relied on for the construction of the rates.

Exam. SEAL.—How many exhibits are there?

[103—21]

Mr. BANKS.—Seventeen.

Exam. SEAL.—Complainant's Exhibits 1 to 17 are received.

(The various statements so offered were received in evidence, thereupon marked "Complainant's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12,

13, 14, 15, 16 and 17, respectively, Witness Roberts," and are forwarded herewith.)

Q. (By Mr. BANKS.) Did your company pay and bear the freight charges on all shipments listed in this complaint? A. Yes, sir.

Q. Please state in a general way the problem that confronted you in the interpretation of these rates and the manner in which you interpreted them.

A. Effective June 25, 1918, all freight rates were increased 25 per cent with the exception of a few short lines. This general increase of 25 per cent was modified by F. R. A. 96 of the Director-General of the Division of Traffic of the United States Railroad Administration, July 11, 1918.

I have here a copy of Freight Rate Authority No. 96, which is—or at least it is referred to or reproduced in a letter signed by A. C. Johnson, Chairman of the Western Freight Traffic Committee, dated July 22, 1918. [104—22] at Chicago, Illinois, or at least it states 608 South Dearborn Street—Rate Advice Letter No. 38. I desire to read the part of this rate Advice Letter No. 38 which is we think pertinent to this case. I will later introduce this as evidence.

Exam. SEAL.—If you are going to introduce it as evidence offhand I would not see any need to read any part of it into the record.

A. I wanted to read that part of it which provides for adding the 4.5 cents to the continuous through movement, in connection with the permission of the Interstate Commerce Commission—

Exam. SEAL.—That will speak for itself.

Mr. BANKS.—I think you can introduce that and it will speak for itself.

The WITNESS.—All right.

Exam. SEAL.—Copy of Freight Rate Authority No. 96 is received in evidence as Exhibit 18.

(The copy of Freight Rate Authority No. 96 so offered was received in evidence, thereupon marked "Complainant's Exhibit No. 18, Witness Roberts," and is forwarded herewith.)

The WITNESS.—There is also attached, Mr. Examiner, a copy of the Interstate Commerce Commission's permission No. 47,201. [105—23]

Exam. SEAL.—That will also be a part of Exhibit 18.

The WITNESS.—That is part of the same exhibit, yes.

In compliance with this Freight Rate Authority No. 96 the carriers generally amended their tariffs by publishing the rule reading substantially as follows:

"When the total charges on the through shipment of petroleum and petroleum products, car-loads, classified fifth class in Current Western Classification, are constructed on separately established rates applying to and from junction points, first determine the through rate or through combination of rates in effect June 24, 1918, and then increase such combination of rates 4.5 cents."

Q. (By Mr. WESTLAKE.) From what is that a quotation, that you have just read?

A. That or similar rules are carried in each of

the tariffs referred to in the exhibits which I have submitted as Nos. 1 to 17.

Q. (By Mr. ROEHL.) That is not exactly correct, Mr. Roberts, is it?

A. I will amend that. The rule is carried in some one of the tariffs making up the combination of rates.

Q. (By Exam. SEAL.) On each of the shipments involved in this case? A. Yes, sir.
[106—24]

Q. (By Mr. ROEHL.) I would like to straighten that out, if you don't mind. If you will refer to Exhibit No. 7, Mr. Roberts, you will find it covers a movement of oil from Salt Lake City to Alturas, California, over the Western Pacific and the Nevada-California-Oregon Railroad. That is correct, is it not? A. Yes, sir.

Q. Now, was there any such combination rule in the tariffs of the Nevada-California-Oregon Railroad at the time those shipments moved?

A. No, sir. It is not contended that there is, but there was such a rule in the Western Pacific tariff.

Exam. SEAL.—That is the contention is, as I understand, that the rule was carried in a tariff applicable over the line not federally controlled in each instance?

Mr. ROEHL.—Yes, and of course the N-C-O, or any railroad not under federal control, would not be bound by it.

Exam. SEAL.—That is a question to be argued.

Q. (By Mr. ROEHL.) I would like to ask one more question of Mr. Roberts. Do you remember

whether or not the Nevada-California-Oregon was released from federal control, and on what date?

A. I do not. This rate, so constructed according to these rules, was limited by the fifth class rates, that [107—25] is, fifth class rates as increased June 25, 1918, not to be exceeded.

Q. (By Mr. BANKS.) Were the tariffs uniformly made effective on the same date?

A. No, they were not. Some of the tariffs were amended to carry this rule fully thirty days after other tariffs were amended. The result was that a good many shipments moved under conditions where only one of the tariffs naming one of the factors carried this combination rule.

The question then first arose as to whether this combination rule was sufficient authority to apply the single increase to the through continuous movement. The question led to a great deal of controversy, the Western roads—that is, I mean by that the lines operating on the Pacific Coast—generally held that where this rule was carried in one of the tariffs naming one of the factors, that it was of sufficient authority to apply it to the continuous through movement even though the tariffs naming the other factors did not carry such a rule, nor were the other lines party to the tariff that did carry the rule.

Q. (By Exam. SEAL.) Was not that interpretation limited to roads under federal control?

A. I believe it was, yes. That, however, did not appear at the beginning of the controversy. You understand, [108—26] Mr. Examiner, that this

question has been extended over that period since Freight Rate Authority No. 96 first became effective up to the present time, and is still going on.

Q. Did you take this matter up with the San Francisco District Freight Traffic Committee at any time and ask for their view?

A. Yes, the matter was referred to the San Francisco District Freight Traffic Committee for a ruling, and I have here a letter, original letter signed by W. G. Barnwell, Chairman, Division of Traffic, Western Territory, United States Railroad Administration, dated January 30th, file DFC-1799-S-3, which, with your permission, I will read into the record.

Q. (By Exam. SEAL. How long is it?

A. It is just a short one.

Q. Have you a copy of that that you can introduce?

A. I have no copy with me. If one copy is sufficient I don't think we will need it for this case.

Mr. BANKS.—We can supply the copies.

Exam. SEAL.—If you want to introduce the original I will permit you to withdraw it to be copied.

Mr. BANKS.—I suggest that you introduce the original and withdraw it and have copies of it made.

The WITNESS.—I neglected to state there that this [109—27] letter was addressed to S. G. Casad, Traffic Manager, Standard Oil Company, San Francisco, California.

Exam. SEAL.—Is there any objection to the introduction of this letter?

Mr. WESTLAKE.—It is largely a question of tariff interpretation, may it please the Examiner, and I do not suppose the commission will be bound by Mr. Barnwell's opinion in the matter.

Exam. SEAL.—No, I don't think the commission will feel bound. I suggested that it be introduced in this way, rather than to read it into the record, because I think it is a better way of handling it.

Mr. ROEHL.—Lines not under federal control would like the record to show at this point what the letter indicates.

Exam. SEAL.—The letter described by the witness will be received and marked Complainant's Exhibit 19. It may be withdrawn for the purpose of copying and returned to the commission within fifteen days.

(The letter in question so offered was received in evidence, thereupon marked "Complainant's Exhibit No. 19, Witness Roberts," and is forwarded herewith.)

Q. (By Mr. BANKS.) Did you pay any freight charges based on the ruling in that letter where only one of the tariffs named the so-called combination rule? [110—28]

A. Yes, the carriers presented freight charges based on the rate in effect June 24, 1918, plus 4.5 cents, in accordance with the provisions of this letter when one of the tariffs naming one of the factors carried the combination rule, and even though the other lines participating in the haul did not publish such rule in their tariffs, nor did they concur in the tariff in which the rule was published.

Q. (By Exam. SEAL.) That does not apply to any of the shipments involved in the case, does it?

A. I am not sure whether we paid undercharges on any of these shipments or not, but I think not.

Q. Your position here is that you paid a double advance on the shipments, as I understand it?

A. Yes, our position is that the charges as collected on the shipments represented in this complaint were based on rates which were in excess of the single increase.

Q. These shipments that you refer to on which you were assessed a single increase, did they move over nonfederal-controlled lines?

A. No, they moved—they did not move entirely over federal-controlled lines; there may have been some of them that moved over nonfederal-controlled lines, but I could not state positively that there was any.

Q. (By Mr. BANKS.) Not over nonfederal lines? [111—29]

A. No.

Q. (By Exam. SEAL.) On which you paid on basis of one advance, that is, you don't know whether there were any?

A. No, I don't.

Q. Which moved over nonfederal lines?

A. We were not informed as to what railroads were under federal control and what were not. The carriers themselves I understand did not always know.

Q. (By Mr. BANKS.) Then in paying the freight charges where only one of the tariffs car-

rier the so-called combination rule, the other not carrying it, and where it was based on a 4.5 cent increase for the through movement, wouldn't that leave undercharges existing in case the commission should not uphold the contention in this case?

A. Yes, it would. If the commission's decision in this case would be that the rule which was carried in one of the tariffs naming one of the factors was not authority for applying a single increase, then we would be in the position of having to pay back to the railroads in the way of undercharges, approximately \$8,000.

The carriers have also paid quite a number of claims in which the same principle is involved, and we would of course have to pay that back.

Q. Were those carriers that paid the claims all federal-controlled [112—30] carriers?

A. Yes, that is, I presume they were. I am not posted as to what railroads were under federal control and what were not. In interpreting tariffs and applying freight charges we endeavored to follow the letter of the tariff, and, nothing appearing in the tariffs to indicate what were federal-controlled and what were not, we disregarded that question altogether.

Q. (By Exam. SEAL.) In going through your Exhibits 1 to 17, can you point out which of the lines over which shipments moved were not under federal control?

A. I could not, Mr. Examiner, no. I am not posted as to what roads were under federal control,

and what were not. There are some of them I do know now were not under federal control, but I could not say as to all of them.

Q. (By Mr. BANKS.) Did you later receive ruling contrary to the one which you have introduced as from Mr. Barnwell?

A. Yes, we had some shipments that originated in Rochester, New York, some of which are represented in the exhibits which I have submitted, and this question eventually I believe came to the notice of some of the eastern carriers, and was referred to the Chicago Committee, and the opinion of Mr. Johnson, who was chairman of that committee, of the Western Freight Traffic Committee, was not in accord with the opinion as expressed by Mr. Barnwell in the letter I [113—31] have just introduced as evidence.

I have here a copy of Mr. Johnson's letter, dated at Chicago, November 28, 1919, file F-25, which—

Q. Have you extra copies of that?

A. It is addressed to Freight Traffic Officer of Railroads under federal control in Western territory, and the purport of this letter is that if a so-called combination rule is carried in a tariff containing one of the factors, but a like rule is not carried in the tariff or tariffs containing the other factor or factors to the combination, such combination rule may not be applied in combination with a carrier not a party to the tariff containing the combination rule.

Q. (By Mr. WESTLAKE.) Who was Mr. Johnson?

A. Mr. Johnson was Chairman of the Western Freight Traffic Committee at Chicago.

Q. That was a committee superior to the San Francisco Freight Traffic Committee, of which Mr. Barnwell was Chairman?

A. That is a question I couldn't answer. I don't know whether Johnson had authority over Mr. Barnwell or not.

Mr. WESTLAKE.—Well, he did.

Mr. ROEHL.—What is the date of Mr. Johnson's letter?

A. That was dated November 28, 1919.

Q. (By Mr. BANKS.) Have you copies of that last? [114—32]

A. I have sufficient copies so that I can introduce this in evidence, if necessary. Of course this is not in our favor, but we want the commission to have full information.

Q. (By Mr. MAHAFFIE.) That is the rule on which the charges you complain of was based, was it not?

A. Yes.

Q. (By Exam. SEAL.) Do you wish to introduce that?

A. Yes, I would like to introduce that for the information of the commission.

Exam. SEAL.—The copy of letter described will be received as Exhibit 20.

(The letter in question was received in evidence, thereupon marked "Complainant's Exhibit No. 20, Witness Roberts," and is forwarded herewith.)

Q. (By Mr. BANKS.) In lieu of the combina-

tion rule did the carriers finally adopt a different method of publishing the rates?

A. I would like to make one statement before I answer that question, if you please; that is to say, that notwithstanding this ruling of Chairman Johnson, that the carriers continued to render freight bills, based on a single increase, even though only one of the tariffs naming the combination rate carried the combination rule, and when the other lines participating in the haul did not concur in that tariff; the only exceptions being the [115—33] shipments which were specifically covered in this complaint; the other shipments still stand in our accounts on basis of the single increase.

Q. (By Exam. SEAL.) How did it happen that you were billed for these at the double increase?

A. That is rather a hard question to answer, but I can say that the majority of the shipments represented by these exhibits that I have introduced moved partly over nonfederal lines, and the carriers generally refused to apply the combination rule in connection with nonfederal lines.

Q. Isn't the question involved in this case, so far as movements over federal-controlled lines are concerned the same as that decided by the commission in the Sligo Iron Case, or are you familiar with that case?

A. Yes, I think it is exactly the same as that case.

Q. The only difference here is where a nonfederal-controlled line is involved, as I understand it?

A. I believe that is correct, yes.

Mr. BANKS.—It does not appear that there were any nonfederal lines in connection with the docket 10154.

Exam. SEAL.—If that is the number of the Sligo case.

Q. (By Mr. BANKS.) Did the carriers finally adopt a different method of publishing the rates?

A. Yes, as tariffs naming the rates in effect June 24th, [116—34] 1918 were cancelled, then it became necessary to adopt some other plan, or some plan other than these so-called combination rules, in order to avoid referring to a tariff that had been cancelled, for a basis on which to build up the rate.

The carriers finally adopted what is usually referred to as rate tables. The principle being the same as the so-called combination rule, and the effect being the same.

It was intended—or at least I would not say it was intended, because I don't know the intention of the makers of the tariff, but the effect of these combination rules was exactly the same as the effect—I mean to say the effect of the rate tables was exactly the same as the effect of the combination rule.

Exam. SEAL.—Off the record (discussion).

Q. (By Mr. BANKS.) Do you think it necessary to elaborate on those tables inasmuch as the principle is the same as shown in the others, and it is set forth in the exhibits there?

A. I think not. The rules are all practically the same as the combination rules, in that they state that in the case of combination rates that each factor

of the combination will be reduced by a certain amount.

Q. (By Exam. SEAL.) You are referring to the different [117—35] rules in the tariff?

A. The tables, the rules in connection with these rate tables that were published in lieu of the combination rule.

Q. (By Mr. BANKS.) Mr. Roberts, take your exhibit of the rates from El Segundo to Holtville and with the tariff endeavor to explain just what the tables of rules refer to:

Q. (By Exam. SEAL.) What is the number of that exhibit?

A. No. 11. This covers a shipment classified fifth class from El Segundo, California, to Holtville. The fifth class rate from El Centro to Holtville, California, is $12\frac{1}{2}$ cents. There was no through joint rate in effect from El Segundo to Holtville, rates being made by combination of different factors, found in different tariffs.

There was a commodity rate from El Segundo to El Centro, California, of $53\frac{1}{2}$ cents.

By referring to rule 7, page 44 of Pacific Freight Tariff Bureau I. C. C. No. 424 of F. W. Gomph, Agent, in which tariff this commodity rate is found, I find the following provision:

“When through rate from point of origin to destination on petroleum and petroleum products, classified fifth class in current Western Classification, carloads, is [118—36] made by combination of two or more separately established factors, such through rate will be constructed in the following

manner: (a) Where the separately established fifth class rate (disregarding the minimum fifth class rate) is the same as the figure shown in column 1 of table of rates, page 48, the factor for basing the through rate will be the figure shown opposite in column 2.

“(b) Where the separately established commodity rate is the same as the figure shown in column 1 of table of rates, page 48, the factor for basing the through rate will be the figure shown opposite in column 3.

“(c) To the sum of the factors arrived at by use of formula in paragraph (a) or paragraph (b), or paragraphs (a) and (b), add 4.5 cents per 100 pounds; fifth class rate from point of origin to destination not to be exceeded.”

I have referred to a commodity rate named in this tariff of $53\frac{1}{2}$ cents. By referring to table of rates shown on page 48 I find that when the rate shown in column 1 is $53\frac{1}{2}$ cents that the rate shown in column 3, which is the column for commodity rates, the basing factor will be 49 cents. The fifth class rate from El Centro to Holtville is $12\frac{1}{2}$ cents, as named in Holton Interurban Railway Company's Tariff I. C. C. No. 11. [119—37]

In column No. 1 of this table, when the fifth class rate is $12\frac{1}{2}$ cents, as shown in column No. 1, the factor to be used, as shown in column No. 2, is ten cents.

We will go back to the rule which provides that to the sum of these factors 4.5 cents should be added. This would make a total combination rate

of 63½ cents to be applied, the same as would be used if the rate in effect June 24, 1918, plus 4.5 cents was applied.

Q. (By Exam. SEAL.) Plus 4.5 cents for the through continuous movement?

A. For the through continuous movement.

Q. The result is the same whether the tariff carries this formula or the combination rule which you previously read? A. Yes, sir.

Exam. SEAL.—And the rates are arrived at in one or the other of those two ways, as I understand it.

Q. (By Mr. WESTLAKE.) Mr. Roberts, were these two rates, 49 cents and 10 cents the rates on June 24th, 1918?

A. No, sir, those were the current rates in effect at the time shipments moved—53½ cents reduced by this rate table to 49, and the other factor, 12½ cents, reduced by the rate table to 10 cents, then adding the 4.5 cents. [120—38]

Q. All right, now you said the result of 63½ cents would have been just the same as adding 4.5 cents to the rate in effect June 24, 1918?

A. That is correct.

Q. Now, were these rates on June 24, 1918, 49 cents and 10 cents? A. They were not.

Mr. BANKS.—They were—I beg pardon.

Q. (By Exam. SEAL.) They would be if they were each increased 4.5 cents?

A. Oh, yes, that is true.

Q. (By Mr. WESTLAKE.) No, I don't get you yet.

A. I can tell you what the rates were that were in effect.

Q. All right, give me the rates.

A. That is correct. The rate in effect June 24, 1918, was 49 cents from El Segundo to El Centro, and 10 cents from El Centro to Holtville.

Q. Then all that this table really means is that you go back to your rates of June 24, 1918, and add 4.5 cents?

A. The effect is the same, but you don't go back to the tariff that names the rates in effect June 24, 1918.

Q. But the fellow that got up the table did?

A. He did, yes.

Q. (By Exam. SEAL.) Was this movement, for example, entirely over federal-controlled lines? [121—39]

A. To Holtville, I believe not; I believe that was a nonfederal line.

Mr. ROEHL.—Yes, the Holton Interurban was a nonfederal line, as I understand it.

Q. (By Exam. SEAL.) Do I understand its tariff carried this table?

A. No, sir, just the tariff of the federal line, which was Pacific Freight Tariff Bureau I. C. C. No. 424. The Tariff, No. I. C. C. 11 of the Holton Interurban Railway Company, did not carry such a table.

Q. It published a rate of 12½ cents?

A. Yes, sir.

Q. In reducing that to 10 cents you refer back to the Pacific Freight Bureau Tariff?

A. Yes, sir.

Q. (By Mr. ROEHL.) That is representative of what you have done in all these similar cases?

A. That is representative, yes.

Q. (By Mr. BANKS.) And the rule shown in Agent Gomph's tariff I. C. C. 424, rule 7, which you have just referred to, constituted a holding out of the rates that would be constructed in accordance with the method prescribed therein, regardless of whether or not the Holton Interurban Railway was a party to this tariff?

Mr. MAHAFFIE.—I have to object to that. It seems to [122—40] me it involves a conclusion of the witness on a tariff, which obviously must be considered a legal principle.

(The question was read by the reporter.)

Mr. ROEHL.—We object, Mr. Examiner.

Exam. SEAL.—That is a question to ask the Commission to decide, is it not?

Mr. BANKS.—I believe it is.

Exam. SEAL.—I sustain the objection.

Q. (By Mr. BANKS.) The example which you cite there of the Holton Interurban is just merely an example of all the cases, is it not? A. Yes.

Q. Have you any record of any claims paid where they were based on rates where only the 4.5 cents was added to the through continuous movement?

A. Yes, I have. I would like to introduce as evidence copies of these claims which have been paid by the carriers, merely as representative of other claims which have been paid; in other words, it is

not to be understood that these are all of the claims that have been paid by the carriers.

Q. (By Mr. MAHAFFIE.) Can you furnish them all?

A. We could, yes, we could furnish all of them, but it would require a good deal of work and it would make quite a large exhibit. [123—41]

Exam. SEAL.—Off the record (Discussion).

Mr. BANKS.—I think this can be left out.

Mr. MAHAFFIE.—I would rather like to have that statement in the record if the counsel is willing to concede that section 6 is the only violation of the Interstate Commerce Act complained of here.

Exam. SEAL.—I think the complaint states that.

Mr. MAHAFFIE.—The complaint carries violation of section 10 of the Federal Control Act, which might be construed as broadening the issue, and I wondered if it was so intended.

Exam. SEAL.—You are not bringing in the question of reasonableness of rates charged; it is only tariff interpretation?

Mr. BANKS.—One of tariff interpretation, not the reasonableness of any of the factors involved; just a question of whether or not the 4.5 cents should be added for the through continuous movement, that is all.

Mr. MAHAFFIE.—Which is simply a violation of Section 6.

Mr. BANKS.—Yes, in the case of an adverse decision, Mr. Roberts, you say there would be a number of undercharges that would have to be paid on

shipments where rates had been constructed, having only added 4.5 cents to the through rate? [124—42]

A. Yes, I estimate the undercharges would amount to about \$8,000, exclusive of the claims which have been paid.

Q. What is the average weight of the shipments involved in this complaint?

A. Most of the shipments were tankers, the cars having a capacity of approximately 10,000 gallons. At the estimated weight provided for in the tariffs and classifications those shipments would weigh 66,000 pounds.

Q. Then a fair average weight would be 66,000 pounds per car? A. I think so, yes.

Q. Is there anything further, Mr. Roberts?

A. If it is considered as pertinent to the issue I would like to state the manner in which these rates are provided for at present. In other words, how they stand in the tariffs to-day, both with respect to Federal and nonfederal lines.

Exam. SEAL.—Any objection on behalf of the defendant?

Mr. ROEHL.—Isn't that the same proposition we were discussing a while ago?

Mr. MAHAFFIE.—I don't see the pertinency.

Exam. SEAL.—I do not believe offhand that that would have any influence on the question here, either.

Mr. ROEHL.—I think it is the same thing we were discussing [125—43] a while ago.

The WITNESS.—The exhibit would show that the carriers have established through joint commodity rates in connection with nonfederal lines, based on the single increase, and that these rates were published without any indication of an increase or a decrease, which would indicate that the carriers themselves felt that the single increase—

Mr. MAHAFFIE.—I have to object to that, as to what it would indicate. It is obviously a conclusion of the witness.

Exam. SEAL.—Off the record (Discussion)

Exam. SEAL.—Is there anything further, Mr. Roberts?

A. Nothing further, Mr. Banks, take the witness.

Cross-examination.

Q. (By Mr. MAHAFFIE.) As assistant traffic manager of the Standard Oil Company what are your duties?

A. That is rather hard to explain in detail, at least, but one of my duties is the keeping in close touch with all rate changes and rate adjustments, and to supervise the application of the rates in payment of freight charges so that they will be strictly in accordance with the letter of the tariff; in other words, neither any undercharges or over-charges.

Q. You attend to traffic matters? [126—44]

A. Yes, sir.

Q. You testified that you knew that the company paid and bore the charges involved here. How did you know that?

A. I know that our records show that we paid the freight charges.

Q. You know the records show it?

A. Yes, sir, in every case that we paid the freight charges. The shipments were all consigned to the Standard Oil Company and we paid the freight.

Q. You learned that from an examination of the records, then? A. Yes, sir.

Q. Have you examined the records in regard to these particular shipments yourself?

A. Yes, sir.

Q. (By Exam. SEAL.) Was the Standard Oil Company the consignor of all these shipments?

A. No, some of the shipments moved from the east, from eastern points, where the Standard Oil was not the consignor; but in every case the charges followed and we paid them.

Q. Paid at destination?

A. Paid at destination, yes, sir.

Q. And were not charged back to the consignor in any way? [127—45]

A. Not charged back to the consignor. No part of the charges was charged back to the consignor in any way.

Q. (By Mr. BANKS.) Mr. Roberts, there may have been instances where some of those shipments originating in the east were prepaid for our account too, were there not?

A. Not as I remember it. It has been some time since I examined these, but I do know that the Standard Oil Company bore the charges.

Q. (By Mr. MAHAFFIE.) Where did you examine them? A. In the office.

Q. In the office here?

A. The office in San Francisco, yes, sir, from our records.

Q. Who made the record?

A. Chief clerk, Mr. Cooper.

Q. Your knowledge of the transactions involved in connection with these shipments is limited to your examination of those records in preparation for this case? A. It is, yes.

Q. You had no connection, as I understand it, with the transactions at the time they took place, so far as the purchase and sale of these products was concerned, beyond the shipping details and checking the freight?

A. We check the freight—not only check the freight, [128—46] but we pay the freight, and we also indicate to whom the freight charges shall be—who shall stand the freight charges, what department. We have several different departments in the Standard Oil Company, and it is the duty of the traffic department to apportion the freight to the proper department.

Q. Taking the shipments shown on your exhibit No. 17, Richmond, California, to Yerington, Nevada, who was the consignor in that case?

A. The Standard Oil Company was the consignor of that shipment.

Q. Who was the consignee?

A. Standard Oil Company.

Q. Is the Standard Oil Company the consignee in each of the shipments shown? A. Yes, sir.

Q. Taking the other exhibits, other than num-

bers 1 to 17, is it the same situation as to the consignee as in 17? A. Yes, sir.

Q. The Standard is the consignee in each instance? A. Yes, sir.

Q. Taking Exhibit 17 again, where was the freight paid?

A. That was prepaid at Richmond, as I remember it.

Q. As I understand your testimony, your knowledge as to [129—47] the transaction is derived from the examination of the records here in San Francisco, of the sales? A. Yes.

Q. And the consignor and consignee?

A. Yes, sir. We keep a record of the consignor, consignee, car number, initial, shipping point, destination, rate; and then in the same book we indicate to whom the freight charges are charged.

Q. (By Mr. WESTLAKE.) Take your Exhibit No. 11, where the movement was partly over the Santa Fe, Southern Pacific and Holton Interurban Railway. Now, as to the movement over the Southern Pacific and the Santa Fe, the rate was found in the bureau tariff, was it not?

A. Yes, sir.

Q. And the rate from El Centro to Holtville was found in the Holton Interurban tariff?

A. It was.

Q. Now, did the bureau tariff make any reference whatever to the Holton Interurban tariff?

A. It did not.

Q. Did the Holton Interurban tariff make any reference to Agent Gomph's tariff?

A. It did not.

Q. Now, in the case of that shipment, were the freight charges collected at point *or* origin or destination? [130—48] A. Point of origin.

Q. Where would the Holton Interurban Railway find any authority for charging less than $12\frac{1}{2}$ cents on the movement from El Centro to Holtville? Where did it have in those tariffs any place any provision that anything less than $12\frac{1}{2}$ cents could be charged for that movement?

A. In so far as the Holton Interurban Railway is concerned, taking that rate as named in their tariff separately and apart from the other movement, they had no authority; but considering it as part of a through movement we contend that the rules of the notes carried in the bureau tariff were authority for applying what might be termed a through rate.

Q. But it wasn't a through rate, and by what process of reasoning can you come to the conclusion that the Holton Interurban is authorized to deviate from those plain tariff provisions and go to the tariff to which it was not a party and which was in no way referred to in its own tariffs?

A. I will answer that by saying, if you please, that the bureau tariff made a provision that in the absence of through rates, when the rates were made by combination of different factors found in different tariffs, that the rate to apply would be the rate in effect June 24, 1918, plus 4.5 cents for a through continuous movement. That [131—49] was not limited in any way, and, as we see it, the carriers who published that rate in the tariff should make

good the holding out to the public that the rate would be so constructed; in other words, it would be a matter of divisions as between the Holton Interurban and the other lines. The lines that published the tariff naming the combination rule should be held to it.

Q. That might be so, possibly, as to the Pacific Freight Tariff Bureau carriers, but what I am trying to find out is how you can find any authority for the Holton Interurban charging anything less than 12½ cents on a movement from El Centro to Holtville?

Exam. SEAL.—I think that is a question for argument.

Mr. WESTLAKE.—That is what I was doing with the witness.

Exam. SEAL.—You have gone as far as you can, apparently.

Q. (By Mr. ROEHL.) Mr. Roberts, will you please refer to your Exhibit 7? That exhibit covers a movement from Salt Lake City, Utah, to Alturas, California, via the Western Pacific Railroad and the Nevada-California-Oregon Railroad, does it not?

A. Yes, sir.

Q. And in paragraphs numbered "b" and "c" under the heading of "Tariff Authority,"—or, in paragraphs "a," "b" and "c" under the heading of "Tariff Authority," [132—50] you have specified the tariffs which contained the rates on which those shipments moved, is that correct?

A. That is correct.

Q. Now, is it not a fact that N-C-O Railway Tariff 9-A is a local tariff of the N-C-O Railroad?

A. It is.

Q. Is it not a fact that the Western Pacific Railway Tariff 163-C, I. C. C. No. 216 is a local tariff of the Western Pacific Railway?

A. I think it is a local tariff.

Q. In other words, in this particular case the tariffs from which you have taken these rates are both local tariffs of these respective lines?

A. Yes, sir, that is correct.

Q. And the Nevada-California-Oregon Railway Tariff, as I understand, contained no combination rule, that is, no rule whereby the increase was applied to a joint movement?

A. That is correct, the rule which we relied upon being carried in the Western Pacific tariff.

Q. Do you know who was the consignor and the consignee of the shipments in that exhibit?

A. I cannot say definitely who were the consignors. The Standard Oil Company was the consignee.

Q. Now, can you say whether the N-C-O. Railroad paid any [133—51] claims to the Standard Oil Company for refund in the cases which you mentioned a while ago?

A. No, I couldn't say that they did.

Q. Did you ever have any ruling from the Nevada-California-Oregon Railroad which is contrary to its contention in this case?

A. No, sir, never took the matter up with the Nevada-California-Oregon Railroad. We relied en-

tirely on the tariff that published the combination rule, and the traffic officials of that line.

Q. (By Exam. SEAL.) Was the N-C-O under federal control?

Mr. ROEHL.—It was under federal control up until June 29, 1918.

Exam. SEAL.—I would like the record to show, as to these several movements, which of the lines were not under federal control. Will the defendants be able to show that?

Mr. ROEHL.—I mean to ask the Examiner's permission to introduce in the record the relinquishment from federal control of the Nevada-California-Oregon Railway, which was dated June 29, 1918.

Mr. WESTLAKE.—The Nevada Copper Belt is represented here, and we will have testimony as to that company, and also the Virginia & Truckee, and I would like leave to supply hereafter, with copies to the complainants [134—52] and for the record, the date of relinquishment of the other defendant carriers, and also the date under which they were taken under federal control.

Exam. SEAL.—You may have that permission. Can you file that within fifteen days?

Mr. WESTLAKE.—Yes, less than that.

Mr. ROEHL.—That is all.

Q. (By Mr. WESTLAKE.) One other question I wanted to ask Mr. Roberts, and that was whether or not, even though there were two increases applied, that is, the 4.5 cent increase on the federal-controlled line, and something else on the nonfederal-controlled line, the result in all cases was, was it not, that after

the 4.5 cent rate was made effective you paid less than you did before?

A. I don't quite understand that question.

(The question was read by the reporter.)

A. I don't just get the gist of that.

Exam. SEAL.—That is to say, the 4.5 cents was less than 25 per cent added to that factor?

Q. (By Mr. WESTLAKE.) Well, for instance, take your—

A. I see the point, now. You mean to say that the rate would be less even though the rate had been increased 25 per cent?

Q. Exactly. [135—53]

A. I would have to examine the tariffs to say. Just as an estimate I would say not.

Q. Now, take your exhibit here—just pick out any one here where you were paying more after your 4.5 cent increase than before.

A. You mean to say that by applying the double increase it would be higher than applying the 25 per cent increase to each factor?

Q. I say where you added your 4.5 cents flat increase, and used your 25 per cent increase on the federal-controlled line, that that was less than the 25 per cent increase to your federal rate plus the 25 per cent to your nonfederal rate?

A. It was in some instances; in others it was not—depended upon the length of the haul entirely.

Q. All right, pick out some one here where you did not pay less after the 4.5 cent rate went in than before. I think there may be only one or two instances.

A. I would have to have the tariffs involved in order to answer your question. Here is one here I see, Rochester to Colfax.

Q. That is a good one.

A. In all probability the local rate from the junction point to Colfax would be considerably greater under the 4.5 cent increase than it would under the 25 per cent increase. [136—54]

Q. But what would be your through rate.

A. In every case I think it would be found that the increasing the rate, the different factors, each factor 25 per cent, would result in a greater rate than taking the rate in effect June 24, 1918; that is, I mean the sums of the locals, and adding thereto 4.5 cents. That is what we are contending for.

Exam. SEAL.—Will this help in interpreting the tariff, this point we are raising here?

Mr. WESTLAKE.—No, I don't think it will help in the interpretation of the tariff, only these people were a great deal better off after the 4.5 cent rate was put in than they were before, even though the 4.5 cents was not limited—the increase was not limited to 4.5 cents.

Mr. ROEHL.—Even though the 4.5 cents was charged on both factors.

The WITNESS.—In answer to that I would say in so far as these shipments are concerned that might be the case; but take cases where other shipments moved, the undercharges you spoke of that might result, it would be entirely different; take for the short hauls, there would be a different result from the case of the long hauls; all depends on the

length of your haul whether the 4.5 cents was greater than the 25 per cent increase. [137—55]

Exam. SEAL.—It is all beside the point. Any other questions?

Q. (By Mr. MAHAFFIE.) Going back to your remark a while ago that as assistant traffic manager one of your duties was to allocate the charges among the various departments, do you follow that up from that point in any way?

A. I believe I either misstated that or you misunderstood me. I have supervision over that work; I don't do it myself.

Q. Then, adopting your amendment, do you follow it from that point, as to how the charges are handled by the departments to which you charge them?

A. No, we don't follow it up any further than that—to see that each department shares or assumes its share. For instance, the sales department would be charged with the freight on these shipments.

Q. Then, so far as you are concerned, you would have no knowledge as to whether the purchasing department in any way passed on that charge to somebody with whom they were dealing?

A. These shipments would be charged to the sales department, and I would have no means of knowing whether the sales department would pass the freight charges along to someone else.

Mr. MAHAFFIE.—I have to move at this time, Mr. Examiner, [138—56] that the testimony of this witness that the Standard Oil Company paid and bore these charges be stricken from the record

on the ground that it is hearsay, that his knowledge was obtained from records, not from personal knowledge, and that the witness admits he has no opportunity of knowing whether the charges were ultimately passed on or not.

Q. (By Mr. BANKS.) Aren't we in position to offer here the vouchers for these freight bills, which are backed with such charges, the rate shown, and supported by the freight bills?

A. Oh, yes.

Q. (By Exam. SEAL.) The testimony may stand subject to the objection. Any other questions? As I understand, the double advance here consisted of 4.5 cents applied to the factor over the federal-controlled line, and the 25 per cent advance published over the nonfederal-controlled line where the movement was over a controlled and a noncontrolled line?

A. That was usually the case, yes.

Q. Wouldn't that always be the case?

A. Yes.

Q. The 4.5 cent advance was not published by the noncontrolled line, was it?

A. It was by some of them, yes, sir. The Pacific [139—57] Electric, for instance, carried that, and quite a number of the nonfederal lines.

Q. (By Mr. ROEHL.) Some did and some didn't. A. Some did and some did not.

Q. (By Mr. WESTLAKE.) Was the P. E. a federal-controlled line during all this period?

A. I couldn't say as to that. I think not, though. As I said before, I am not posted on what the federal

lines—it depended entirely upon the application of the rates.

Q. My Mr. ROEHL.) One question, and that is whether the 4.5 cent increase was ever published on the N-C-O Railway?

A. To my knowledge it was not.

Q. And that line never published the combination rule in its tariffs? A. It did not.

(Witness excused.)

Exam. SEAL.—Does that complete your case, Mr. Banks?

Mr. BANKS.—Yes, sir.

Exam. SEAL.—Defendants may proceed.

Mr. ROEHL.—If the Examiner please, if there is no objection from the counsel, I would like to have the commission receive in evidence a copy of a letter from Mr. John Barton Payne, dated Washington, June 29, 1918, addressed [140—58] to Mr. Charles Moran, President, Nevada-California-Oregon Railway, 68 William Street, New York, relinquishing the Nevada-California-Oregon Railway from federal control as of that date.

Exam. SEAL.—The copy will be received and marked Defendants' Exhibit 21.

(The copy of letter so offered was received in evidence, thereupon marked Defendants' Exhibit No. 21, and is forwarded herewith.)

TESTIMONY OF P. H. COOK.

P. H. COOK was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. WESTLAKE.) Mr. Cook, what are your initials? A. P. H.

Q. Your residence? A. Mason, Nevada.

Q. What is your occupation?

A. Superintendent and traffic manager, Nevada Copper Belt Railway.

Q. For how long? A. Seven years.

Q. Where is the Nevada Copper Belt Railroad?

A. Connects with the Southern Pacific at Wabuska, and runs to Ludwig, 37.8 miles.

Q. Entirely within the State of Nevada? [141—59] A. Yes, sir.

Q. And during the period involved in this complaint here did you have any joint rates with the Southern Pacific Company on any of the products here involved? A. No, sir.

Q. These rates were entirely Nevada intrastate local rates of the Nevada Copper Belt?

A. Yes, sir.

Q. Did you in your tariffs have any combination rule such as that referred to by the witness for the complainant? A. No, sir.

Q. Did you have any reference in your tariffs to the Southern Pacific tariff or the tariff of any other railroad over which any of these shipments moved?

A. No, sir.

Q. And was the Nevada Copper Belt at any time under federal control? A. They were.

Q. What date did it go under Federal control?

A. We were notified, I think, sometime the early part of 1918, and I received notice myself early in July that we were released. Of course the order came to the Salt Lake office, and I do not know the date of the relinquishment. [142—60]

Q. But sometime in July the railroad had been released from federal control, that is, July or possibly prior to July, 1918? A. Yes, sir.

Q. And did you as of June 25, 1918, increase your rates 25 per cent? A. I did.

Q. Did you ever put in force or effect the 4.5 cent increase to which reference has been made?

A. No, sir.

Mr. WESTLAKE.—That is all.

Q. (By Mr. BANKS.) Your tariffs were filed with the Interstate Commerce Commission, were they not? A. Yes, sir.

Mr. BANKS.—That is all.

Exam. SEAL.—The witness is excused.

(Witness excused.)

TESTIMONY OF H. L. GRIFFITH.

H. L. GRIFFITH was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. WESTLAKE.) What is your name, please? A. H. L. Griffith.

Q. Where do you live, Mr. Griffith?

A. Carson City, Nevada.

Q. And your position is what? [143—61]

A. General freight agent, Virginia & Truckee Railway.

Q. How long have you been such?

A. About three years.

Q. And how long had you been connected with that railroad prior to that date?

A. About twelve years.

Q. Where is the Virginia & Truckee Railway?

A. Runs from Reno, Nevada, to Virginia City, Nevada, having a branch from Carson City, Nevada, to Minden, Nevada.

Q. Does it operate any portion of its railroad outside of the State of Nevada? A. Does not.

Q. Was that railroad at any time under federal control?

A. I believe it was, with the other lines, from sometime in January, 1918, until June 29, 1918, or approximately that date it was released from federal control.

Q. On June 29, 1918, or approximately that date it was released from federal control?

A. Yes, sir.

Q. Now, did the Virginia & Truckee Railway in any of its tariffs publish the combination rule to which reference has been made here?

A. It did not.

Q. Or in any way refer to the tariffs of any of its connections [144—62] which might have published such a rule? A. It did not.

Q. And were the rates which were charged in connection with the shipments involved in this complaint rates published in tariffs which were entirely local tariffs of the Virginia & Truckee Railway?

A. The factors used in making the combination rates were local rates.

Q. They were entirely local rates?

A. They were entirely local rates.

Q. Did you have any joint rates on the commodities here involved at the time here in issue— On the commodities mentioned in the complaint?

A. Did not.

Q. Did you on or about June 25, 1918, increase your rates 25 per cent in accordance with General Order No. 28? A. Yes.

Q. Did you ever publish the 4.5 cent increase?

A. No.

Q. You have always on all shipments moving to points on your line charged the local rate as shown in your tariffs on these commodities? A. Yes.

Mr. WESTLAKE.—That is all. [145—63]

Mr. BANKS.—No questions.

Exam. SEAL.—Witness excused.

(Witness excused.)

TESTIMONY OF C. B. ACKERMAN.

C. B. ACKERMAN was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. MAHAFFIE.) Have you given your name to the reporter?

A. C. B. Ackerman, Traffic Assistant, United States Railroad Administration, headquarters at Washington, D. C.

Q. State briefly your traffic experience.

A. I have had approximately 25 years railroad experience. Most of my duties during that time had to do with freight rates and traffic matters. Is it necessary to detail all of those roads that I have been connected with?

Q. No. Have you examined the complaint here and heard the testimony in this case? A. I have.

Q. Will you, if you know, go into the situation with regard to the 4.5 cent increase in question here and its applicability?

A. Originally the rates on petroleum were advanced 25 per cent on June 25, 1918, by General Order No. 28, along with other commodities on which there were no flat or specific amounts prescribed in the order. [146—64]

It was represented to the Railroad Administration by various shippers of petroleum products throughout the United States that the effect of the 25 per cent advance disrupted long existing relationships, and they suggested that the Administration commute the 25 per cent advance to an advance of 4 cents per 100 pounds, stating that an advance of 4 cents per 100 pounds would be approximately 25 per cent over the rates in effect June 24th on all traffic.

The Railroad Administration was of the impression that 4 cents was not sufficient, and suggested an advance of 5 cents per 100 pounds, but finally

published 4.5 cents per 100 pounds, as there were no figures available other than figures for prior years.

Subsequent events justified the fears of the Railroad Administration, as it soon came to notice that traffic moved longer distances than had been the case prior to Government control, because of the war and the demand for fuel in many quarters where there had been no demand before.

In publishing the advance of 4.5 cents per 100 pounds it was never the intention to divide that advance where rates were based on locals from and to the junction points. Furthermore, there is no rule of the Commission in Tariff Circular 18-A, or any other place that I have [147—65] been able to locate, which would permit the use of rules in one tariff in connection with traffic moving over the rails of some other railroad. There are points where rates base not on junction points, but on interior points, and if we were to adopt the theory that Freight Rate Authority No. 96 required basing of rates on junction points and adding 4.5 cents to the through factor it might result in higher rates than by advancing both factors of the combination the full amount prescribed in the order. As an illustration, many times rates do not base upon the junction points, but base on an interior point, such as in connection with traffic from east of the Indiana-Illinois State Line, moving to points in Wisconsin; the junction point in many cases is Chicago, Illinois; the rates, for instance, from or to Milwaukee, Wisconsin,—in that case the lines east of Chi-

cago generally carry the Chicago rate to Milwaukee, whereas lines west of Chicago carry a lower basis of rates from Milwaukee than they do from Chicago, and if we were to apply a combination on the junction point, advancing the other factor only 4.5 cents per 100 pounds, there would be a higher rate than by basing on Milwaukee and adding to both factors the full amount prescribed in the order.

That is merely one illustration that might be encountered [148—66] if that theory would be accepted in connection with all traffic.

Mr. MAHAFFIE.—Take the witness.

Cross-examination.

Q. (By Mr. BANKS.) In the publication of these combination rules if it was the intention of the Administration to apply only in connection with lines under federal control do you or do you not think a restriction should have been published in the tariff in connection with the item restricting it?

A. It wasn't necessary, because there is no rule of the Commission which would permit a noncontrolled carrier to use the rules contained in the tariff of some other carrier unless they were a party to the tariff published by the other carrier.

Q. Is it the contention, then, that the rule,—as to federal-controlled lines only—is it the contention that that rule should be published in each of the tariffs?

A. Yes, sir, that is the contention with all rates, whether of noncontrolled or federal-controlled lines—that that rule was not applicable unless it was

contained in every tariff used in constructing the combination of rates.

Q. The fact that the rule is published in two tariffs does not give you any authority, then, to depreciate [149—67] both of the rates before adding 4.5 cents increase?

A. If two tariffs are used in constructing a combination, and the rule is contained in both tariffs, then there is a complete connection between both issues, which would authorize the application of 4.5 cents per 100 pounds higher than the rates in effect June 24, 1918.

Q. That method of constructing rates is not in compliance with the tariff requirements of the commission, is it?

A. Why, as I recall, the commission authorized the carriers to deviate from the provisions of tariff circular 18-A in publishing General Order 28.

Q. (By Mr. ROBERTS.) The United States Railroad Administration issued its Freight Rate Authority No. 96, did it not? A. Yes, sir.

Q. Is it not a fact that in instructing the carriers in regard to the publication of this 4.5 cent increase that they provided in this Freight Rate Authority No. 96 that the increase of 4.5 cents would apply as to the through movement, and not to the separate factors?

A. That is so, but Freight Rate Authority No. 96 applied only to federal-controlled lines, and furthermore, that instruction requiring the increasing of the combination factor 4.5 cents per 100 pounds was the outgrowth of Freight Rate Authority No.

10. Freight Rate Authority [150—68] No. 10 was issued in order to equalize rates in effect via different roads, where by one road there was a joint through rate which had been advanced, not prescribed in any order, or via other roads combination of rates, two factors of which were advanced the full amount prescribed in General Order 28. In order to correct that, Freight Rate Authority No. 10 went further than was intended, and was subsequently canceled.

Q. But the fact remains that in issuing Freight Rate Authority No. 96, that the Railroad Administration instructed the carriers to publish tariffs 4.5 cents per 100 pounds higher than the rates, class or commodity, effective June 24, 1918?

A. That is true.

Q. And that when charges on a continuous through movement are obtained by combination of separately established rates the increase of 4.5 cents per 100 pounds will apply to the total of such combined rates in effect June 24, 1919?

A. That was the usual instruction in Freight Rate Authority 96, but Freight Rate Authority 96 did not apply to nonecontrolled carriers, in the first place; and in the second place, because of tariff applications, it was not always possible to follow instructions contained in [151—69] Freight Rate Authority 96 so far as the combination was concerned.

Q. Have you examined any of the tariffs naming the rates applicable to the shipments mentioned in this complaint?

A. I haven't examined any of the noncontrolled carriers' tariffs.

Q. Have you examined any of the tariffs published by the so-called federal lines? A. Yes, sir.

Q. That carried these combination rules?

A. Yes, sir.

Q. Did you find anything in those tariffs limiting the application of this rule to federal-controlled lines?

A. It was not necessary, as I said before. Rates are not published by negative clauses. If there is no authority for the application of the rule in connection with noncontrolled carriers, and the noncontrolled carriers were not parties to the tariff then the rule would not apply.

Q. Well, then, in the absence of any restriction as to noncontrolled lines, in your judgment if this method of constructing rates could be applied to federal lines other than as concurring, then this advance could be and would be constructed—construed, could it not, to apply [152—70] to non-federal lines as well?

A. I don't understand your question. In one place you say constructed, and in another place you say construed. If you mean that we could have made the 4.5 cents applicable in connection with noncontrolled lines, I will say we could have done so if we wanted to do so, but we did not want to do so. There was no intention of dividing the advance prescribed in General Order 28 with noncontrolled lines when the noncontrolled carriers were not party to the through tariff.

Q. I don't think you understood my question. I

will amend it, if you please. In your judgment, since the tariff of the federal-controlled line which names this so-called combination rule does not limit the application of that rule to federal-controlled lines, if it can be applied to factors of a combination rate named in tariffs of other federal-controlled lines which do not carry a similar rule or are not a party to this tariff which does carry the rule, could it also be made to apply to nonfederal lines naming one of the factors, just the same as to federal lines?

A. You are speaking of a hypothetical case which did not exist. In the first place, we did not advance the combination factors the amount prescribed in the order unless the rule was contained in all tariffs used in constructing [153—71] the combination.

Q. (By Mr. BANKS.) You will find introduced in evidence a letter from Mr. Barnwell of the Railroad Administration, to that effect, and the charges were paid on that basis.

A. Yes, and that ruling was set aside by ruling from Mr. A. C. Johnson, to whom Mr. Barnwell reported.

Q. (By Mr. ROBERTS.) Mr. Johnson's letter was dated later than that of Mr. Barnwell?

A. Yes, sir.

Q. Then in your judgment would the rate, the proper rate be arrived at in conformity to the ruling of Mr. Barnwell until such time as Mr. Johnson's letter became effective?

A. I couldn't say as to that, as it is a tariff interpretation. If the tariff was improperly interpreted

at the time the charges were collected it was the duty of the carriers to properly collect the charges when they were set straight.

Q. Mr. Barnwell was duly appointed official of the Railroad Administration, was he not?

A. True.

Q. Wasn't the Railroad Administration responsible for Mr. Barnwells acts?

A. So far as those acts were in conformity with the law, as I understand. [154—72]

Mr. BANKS.—That is all.

Mr. MAHAFFIE.—That is all.

(Witness excused.)

Exam. SEAL.—Mr. Roberts, I may probably have asked you this question. It is a fact, as I understand, that the combination rule or similar rule was not published by any of these lines which were under federal control?

Mr. ROBERTS.—I think that is the fact, yes, sir. We are depending in this case entirely upon the application of the rules published in the federal lines' tariffs.

Exam. SEAL.—Do you wish to brief this case?

Mr. WESTLAKE.—Yes, sir.

Mr. ROBERTS.—Yes, sir.

Exam. SEAL.—Briefs will be due December 4, 1921. Hearing closed.

(Whereupon at 4:42 o'clock P. M. on the 4th day of November, 1921, the hearing in the above-entitled matter was closed.) [155—73]

(COMPLAINANT'S EX. No. 18 BEFORE
I. C. C.)

COPY

UNITED STATES RAILROAD ADMINISTRA-
TION

Division of Traffic—Western Territory
Western Freight Traffic Committee

Transportation Bldg., 608 So. Dearborn Street.

July 22, 1918.

RATE ADVICE LETTER No. 38.

To Freight Traffic Officers, Railroads Under Gov-
ernment Control, Western Territory:

FREIGHT RATE AUTHORITY No. 96.

RATES ON PETROLEUM AND PETROLEUM
PRODUCTS.

Freight Rate Authority No. 96 of the Director
Division of Traffic, dated July 11th, 1918, pre-
scribes the following basis of increased rates on
petroleum, and petroleum products classified fifth
class in Official, Southern and Western Classifica-
tions, in carloads; said basis to supersede the in-
creased made effective in tariffs or supplements ef-
fective June 25th, 1918.

Commodity—Petroleum and Petroleum Products,
carloads, classified 5th class in Official, South-
ern and Western Classifications.

Minimum Weight.—No change.

From—All points (See Note 2 below.)

To—All points (See Note 2 below.)

Approved rates 4½ cents per 100 lbs. higher than

rates (class or commodity) effective June 24th, 1918. When charges on a continuous through movement are obtained by combination of separately established rates, the increase of 4½ cents per 100 lbs. will apply as to the total of such combined rates in effect June 24th, 1918.

Note 1—On shipments from points in Kansas, Oklahoma and from Sugar Creek, Mo., to points east of Indiana-Illinois State Line and on and north of the Ohio River, including Maryland, Virginia and West Virginia increase above rates in effect May 25th, 1918, to the Mississippi River will be 2½ cents per 100 lbs. and east of the Mississippi River 2 cents per 100 lbs. above the rates in effect May 25th, 1918. Same to be provided for by proportional rates to and from Mississippi River Crossings.

Note 2.—The above does not apply in connection with rates for switching service in connection with a line haul. [156]

Effective Date.—One day's notice to the Interstate Commerce Commission and the public. The Interstate Commerce Commission has issued Special Permission #47201, dated July 18th, 1918, waiving the provisions of rules 4 (i) and 9 (e) of Commission's Tariff Circular No. 18-A. Copy of said Special Permission is attached hereto for your information and guidance.

Tariffs should be amended to conform to above at once. Same should show on title page preceding title of railroads "UNITED STATES RAILROAD ADMINISTRATION, W. G. McAdoo, Director-General of Railroads," and also show

reference to Freight Rate Authority No. 96 of the Director, Division of Traffic, dated July 11th, 1918; as provided for in said Special Permission (copy of which is hereto attached).

A. C. JOHNSON,
Chairman. [157]

(COPY)

INTERSTATE COMMERCE COMMISSION
Washington.

At a session of the Interstate Commerce Commission, Division 2, held at this office in Washington, D. C. on the 18th day of July A. D. 1918.

SPECIAL PERMISSION No. 47201
PETROLEUM AND PETROLEUM PRODUCTS.

The United States Railroad Administration having requested that carriers be permitted to file special supplements to tariffs in abbreviated form thereby enabling carriers to establish, in an economical and expeditious manner, rates on petroleum and petroleum products on the basis authorized by Freight Rate Authority No. 96, dated July 11th, 1918, issued by the Director, Division of Traffic; and

It appearing, That the Commission's rules and regulations, Tariff Circular 18-A, in subdivision (i) of Rule 4 require an explicit statement of the rates, in cents or in dollars and cents, per 100 lbs. per bbl. or other package, per ton or per car, together with the name or designation of the places from and to which they apply; in subdivision (e)

of rule 9 limit the number of, and the volume of, effective supplements to any tariff;

It is ordered, That the provisions of the Tariff Circular 18-A in Rules 4 (i) and 9 (e) be, and they are hereby, unless otherwise ordered, temporarily waived as to, and confined to, special supplements which contain no changes other than in the particulars hereinafter set forth; *Provided,* That no further special supplement to the same tariff shall be issued unless hereafter authorized by the Commission; and

It is further ordered, That carriers be, and they are hereby granted permission to file special supplements to the tariffs containing commodity rates on Petroleum and Petroleum Products, such special supplements to provide for a horizontal increase in rates on said commodities to the extent approved in said Freight Rate Authority No. 96, dated July 11th, 1918, but not otherwise.

It is further ordered, That such special supplement shall specifically cancel the rates on Petroleum and Petroleum Products contained in the Special supplement to the tariff which it amends, filed to become effective on June 25th, 1918.

It is further ordered, That all tariffs amended by special supplements herein authorized to be filed shall be reissued not later than sixty days (60) after the date upon which such special supplements are filed with the Commission, such reissues to be in full conformity with the rules and regulations of the Commission as published in its Tariff Circular 18-A.

And it is further ordered, That each special supplement filed under this special permission shall bear upon its title page the notation "The form of this supplement is permitted by authority of the Interstate Commerce Commission Special Permission No. 47201 of July 18th, 1918."

This special permission is void thirty (30) days from the date hereof.

By the Commission, Division 2:

(Seal) GEORGE B. McGINTY,
Secretary. [158]

(COMPLAINANT'S EX. No. 19 BEFORE INTERSTATE COMMERCE COMMISSION.)

UNITED STATES RAILROAD ADMINISTRATION.

W. G. McAdoo Director General
Division of Traffic Western Territory

San Francisco District
Freight Committee

W. G. BARNWELL, 64 Pine Street
Chairman Room 404
G. W. LUCE San Francisco, Cal.
H. K. FAYE Jan. 30, 1919.
S. H. LOVE File DFC-1799-S-3.
F. P. GREGSON
F. W. GOMPH,
Secretary

Subject: Petroleum Oil from El Segundo to East
San Pedro, Cal.

Mr. S. G. Cassad, Traffic Manager,
Standard Oil Co.,
200 Bush St.,
San Francisco.

Dear Sir:

Referring to your letter of December 9th, file D-418-2310, wherein you ask what the proper increase is for a movement of oil from a point on the A. T. & S. F. RR. to a point on the L. A. & S. L. RR., the increase of $4\frac{1}{2}\text{¢}$ per hundred pounds per Freight Rate Authority No. 96, being in effect for the movement via the A. T. & S. F. RR., but on the L. A. & S. L. Railroad the 25% increase was still in effect, the $4\frac{1}{2}\text{¢}$ increase on the L. A. & S. L. RR. being made effective shortly after the shipment moved.

The combination clause published by the A. T. & S. F. RR., in their tariff made applicable for the continuous through movement of shipments over lines under Federal control but one increase of $4\frac{1}{2}\text{¢}$ per 100 pounds on Petroleum and Petroleum Products.

Where the combination clause is published in one of the tariffs containing the factors of the rate from point of origin to destination and the movement is entirely over lines under Federal control it is proper to increase the rate only $4\frac{1}{2}\text{¢}$ per 100 pounds, disregarding the 25% increase which may still be in effect on one of the Federal controlled lines involved.

We are allowing carbons of this letter to reach interested carriers asking that arrangements be made to protect charges accordingly.

Yours truly,

W. G. BARNWELL.

[Endorsed]: I. C. C. Docket 12890. Exhibit No. 19. Witness Roberts. Date 11/4/21. Reporter Flannery. [159]

(COMPLAINANT'S EX. No. 20 BEFORE
I. C. C.)

(COPY)

UNITED STATES RAILROAD ADMINISTRATION

Western Freight Traffic Committee.

Chicago, Ill., Nov. 28, 1919.

File F-25

SUPPLEMENT No. 9 TO REPRINT OF CIRCULAR No. 3.

CANCELS SUPPLEMENT No. 8.

EXPLANATORY RULES IN CONNECTION
WITH APPLICATION OF RATES UN-
DER GENERAL ORDER No. 28 OF THE
DIRECTOR-GENERAL.

To Freight Traffic Officers, Railroads under Fed-
eral Control in Western Territory.

Reprint of Circular No. 3, dated August 1, 1918 (interpretations of and instructions for compliance with General Order No. 28) is amended as follows:

COMBINATIONS ON COAL, COKE, PE-
TROLEUM, ETC.: Refer to instructions on Page

2 of Supplement No. 1 (as amended by Sup. 5 which eliminated articles covered by Agent E. Moriss' Tariff No. 228 ICC U S 1) and add following relative to application of provision for making combination rates published in a tariff containing one factor of a combination when tariff or tariffs containing other factors to be used in the combination do not contain like provision:

Rules for making combination rates appearing in tariffs naming commodity rates on Coal, Coke, Petroleum or Sugar providing that prescribed specific advances under General Order No. 28 or Freight Rates Authority No. 96, shall be added to the separate factors as in effect June 24, 1918, will not apply in connection with carriers not shown as participating lines in the tariffs that carry such rules, in other words, if such a rule is carried in a tariff containing one of the factors, but like rule is not carried in tariff or tariffs containing the other factor or factors to the combinations, such combination rule may not be applied in connection with a carrier not a party to the tariff containing the combination rule.

A. C. JOHNSON,
Chairman. [160]

(DEFENDANTS' EX. No. 21 BEFORE I. C. C.)
UNITED STATES RAILROAD ADMINISTRA-
TION.

W. G. McADOO, Director General.

Interstate Commerce Commission.

Division of Law,

John Barton Payne, General Counsel.

Washington, June 29, 1918.

Dear Sir:

Pursuant to the recommendation of the Regional Director, the Nevada-California-Oregon Railway is relinquished from Federal Control.

It will be the policy of the Railroad Administration to co-operate with the relinquished roads as to a fair division of joint rates, car supply, and, as far as may be consistent with the national needs, that there be no undue discrimination as to routing.

If you feel that hardship may result from relinquishment and desire to make a contract on fair terms, right is reserved to consider the advisability of making such a contract.

Very truly yours,

(Signed) JOHN BARTON PAYNE.

Mr. CHARLES MORAN, President,

Nevada-California-Oregon Railway,

68 William Street,

New York, N. Y. [161]

November 19, 1921.

STANDARD OIL CO. (CALIFORNIA)

vs.

DIRECTOR GENERAL et al.

I. C. C. DOCKET No. 12,890.

Mr. Robert E. Quirk,

Chief Examiner,

Interstate Commerce Commission,

Washington, D. C.

Dear Sirs:

At the hearing of the above-entitled case at San Francisco, before Examiner Seal, November 4, 1921, it was agreed that the Director General would furnish the Commission information as to the date of release from Federal control of any of the defendants found to have been released prior to the termination of Federal control. In accordance therewith I beg leave to advise you that the following-named defendants were released on the dates specified:

Amador Central Railroad Company ..	June 30, 1918
Holton Inter-Urban Railway Com-	
pany	June 29, 1918
Nevada Copper Belt Railroad Com-	
pany	June 24, 1918
Pacific Electric Railway Company ..	June 26, 1918
Nevada-California-Oregon Railway ...	June 29, 1918
Virginia & Truckee Railway	June 29, 1918

San Diego & Arizona Railway Company June 29, 1918
Yosemite Valley Railroad Company .. June 29, 1918

Yours very truly,

JOHN F. FINERTY,
Assistant General Counsel.

CDM:w.

Cs: Mr. Oscar Banks,
Messrs. Sanborn & Roehl,
Hon. Milton T. Farmer,
James S. Moore, Jr.,
Mr. Elmer Westlake,
Mr. C. B. Stafford.

[Endorsed]: Filed 8/27/25. [162]

DEFENDANTS' EXHIBIT No. "E."

TARIFFS CONTAINING RATES ON SHIPMENTS COVERED BY EXHIBIT No. 5 (IN RECORD BEFORE INTERSTATE COMMERCE COMMISSION) AND TYPICAL OF RATES COVERED BY EXHIBITS (IN I. C. C. DOCKET 12,890) Nos. 1, 3, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17.

Tariff Numbers.

- I. C. C.-1067 R. H. Countiss Agent (1-R).
I. C. C.-4067, Southern Pacific (711-A).
I. C. C.- 13, Holton Interurban (11).
[Endorsed]: Filed 8/27/25. [163]

ONLY THREE SUPPLEMENTS TO THIS TARIFF WILL BE IN EFFECT AT ANY TIME.

C. R. C. No. 403

(For cancellations, see following page)

I. C. C. No. 1067

(For cancellations, see following page)

UNITED STATES RAILROAD ADMINISTRATION

Director General of Railroads

TRANS-CONTINENTAL FREIGHT TARIFF BUREAU

WEST-BOUND TARIFF No. 1-R

(For cancellations, see following page)

—NAMING—

Local, Joint, Export and Import Class Rates —AND— Local, Joint, Export, Import and Proportional Commodity Rates —FROM—

EASTERN SHIPPING POINTS

Designated on pages 1 to 28, inclusive,

—TO POINTS IN—

ARIZONA

MEXICO

NEW MEXICO

UTAH

CALIFORNIA

NEVADA

OREGON

Designated on pages 34 to 90, inclusive.

Governed, except as otherwise provided herein, by Western Classification No. 55 (I. C. C. No. 13 of R. C. Fyfe, Agent), supplements thereto or reissues thereof.

This tariff contains rates that are higher for shorter distances than for longer distances over the same route, such departure from the terms of the amended Fourth Section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Commission Orders F. S. Nos. 3136 of date August 2, 1913, 4206, 4208, 4210, 4215 and 4216 of date August 28, 1914, 4859 of date April 27, 1915, 7046 of date November 20, 1917, 7316 of date May 27, 1918, and as indicated in individual items herein.

NOTE A.—By authority of Rule 77 of Interstate Commerce Commission Tariff Circular No. 18-A, this tariff is not made applicable FROM all intermediate points. Upon reasonable request therefor, commodity rates which will not exceed those in effect FROM the next more distant point will (under authority granted by the Interstate Commerce Commission) be established by the carriers parties to this tariff, FROM any intermediate point hereunder, upon one day's notice to the Commission and to the public.

NOTE B.—By authority of Rule 77 of Interstate Commerce Commission Tariff Circular No. 18-A, this tariff is not made applicable TO all intermediate points. Upon reasonable request therefor, commodity rates which will not exceed those in effect TO the next more distant point will (under authority granted by the Interstate Commerce Commission) be established by the carriers parties to this tariff, TO any intermediate point hereunder, upon one day's notice to the Commission and to the public.

NOTE C.—Departure from the Commission's rules in the publication of alternative rate bases authorized in Item 7, page 95, is permitted until October 31, 1919, under authority of Interstate Commerce Commission Order of October 17, 1918, unless by release of or supplement to this tariff it is brought into conformity with the Commission's regulations at an earlier date.

NOTE D.—Changes which result from additions of or abandonment of stations and station facilities contained in this tariff are filed under authority of the Interstate Commerce Commission's Fifteenth Section Order No. 250 of January 8, 1918, without formal hearing, which approval shall not affect any subsequent proceeding relative thereto.

NOTE E.—Departure from the requirements of Rules 4(h) and 7(b) of Interstate Commerce Commission's Tariff Circular 18-A, in items making reference to this note, is permitted by Special Permission of the Interstate Commerce Commission No. 47996, dated June 21, 1919.

ISSUED SEPTEMBER 10, 1919

EFFECTIVE NOVEMBER 5, 1919

(Except as noted in individual items)

Published (except as otherwise noted) for the Director General of Railroads and filed on thirty (30) days' notice with the Interstate Commerce Commission under Freight Rate Authority No. 12833 (or as amended) of the Director, Division of Traffic, United States Railroad Administration, dated August 27, 1919.

ISSUED BY

R. H. COUNTISS, Agent, 608 So. Dearborn St., Chicago, Ill.

Issued, for account of carriers under Federal control, under authority of Appointment Notice No. 2 of the Director General of Railroads of date November 29, 1918.

PARTICIPATING CARRIERS.

PARTICIPATING CARRIERS (LIST A).

The following carriers under Federal control are party to this issue under authority of Appointment Notice No. 2, November 29, 1918, filed with the Interstate Commerce Commission by the Director General of Railroads.

<p>Abilene & Southern R'y. Ahnapee & Western R'y. Akron, Canton & Youngstown R'y. Alabama & Vicksburg R'y. Alabama Great Southern R. R. Ann Arbor R. R. Arcade & Attica R. R. Arizona Eastern R. R. Arkansas Western R'y. Ashland Coal & Iron R'y. Atchison, Topeka & Santa Fe R'y. Atlanta & West Point R. R. Atlanta, Birmingham & Atlantic R'y. Atlantic & Western R. R. Atlantic City R. R. Atlantic Coast Line R. R. Augusta Southern R. R.</p> <p>Baltimore & Ohio R. R. Baltimore & Ohio Chicago Terminal R. R. Baltimore, Chesapeake & Atlantic R. R. Baltimore Steam Packet. Bangor & Aroostook R. R. Bath & Hammondport R. R. Beaumont, Sour Lake & Western R'y. Belt R'y of Chicago. Bennettsville & Cheraw R. R. Bessemer & Lake Erie R. R. Big Fork & International Falls R'y. Birmingham & Northwestern R'y. Birmingham & Southeastern R'y. Blue Ridge R'y. Boston & Albany R. R. Boston & Maine R. R. Boyne City, Gaylord & Alpena R. R. Brownwood North & South R'y. Buffalo & Susquehanna R. R. Buffalo, Rochester & Pittsburgh R'y.</p> <p>Carolina & Northwestern R'y. Carolina & Tennessee Southern R'y. Carolina & Yadkin River R'y. Carolina, Clinchfield & Ohio R'y. Carolina, Clinchfield & Ohio R'y of South Carolina. Central Indiana R'y. Central New England R'y. Central of Georgia R'y. Central R. R. of New Jersey. Central Vermont R'y. Charles City Western R'y. Charleston & Western Carolina R'y. Chesapeake & Ohio R'y. Chesapeake & Ohio R'y of Indiana. Chesapeake Steamship. Chesterfield & Lancaster R. R. Chicago & Alton R. R. Chicago & Eastern Illinois R. R. Chicago & Erie R. R. Chicago & North Western R'y. Chicago, Burlington & Quincy R. R. Chicago Great Western R. R. Chicago, Harvard & Geneva Lake R'y. Chicago, Indianapolis & Louisville R'y. Chicago, Kalamazoo & Saginaw R'y. Chicago, Milwaukee & Gary R'y. Chicago, Milwaukee & St. Paul R'y. (See Exception 30, page 99.)</p>	<p>Chicago, Peoria & St. Louis R. R. Chicago, Rock Island & Gulf R'y. Chicago, Rock Island & Pacific R'y. Chicago, St. Paul, Minneapolis & Omaha R'y. Chicago, Terre Haute & Southeastern R'y. Cincinnati, Burnside & Cumberland River R'y. Cincinnati, Indianapolis & Western R. R. Cincinnati, Lebanon & Northern R'y. Cincinnati, New Orleans & Texas Pacific R'y. Cincinnati Northern R. R. Cleveland, Cincinnati, Chicago & St. Louis R'y. Clinton & Oklahoma Western R'y. Coal & Coke R'y. Colorado & Southern R'y. Cooperstown & Charlotte Valley R. R. Copper Range R. R. Coudersport & Port Alleghany R. R. Cumberland & Pennsylvania R. R. Cumberland Valley R. R.</p> <p>Danville & Western R'y. Dayton & Union R. R. Delaware & Hudson R. R. Delaware & Northern R. R. Delaware, Lackawanna & Western R. R. Denison & Pacific Suburban R'y. Denver & Rio Grande R. R. (See Exception 45, page 99.) Detroit & Huron R'y. Detroit & Mackinac R'y. Detroit & Toledo Shore Line R. R. Detroit, Bay City & Western R. R. Detroit, Toledo & Ironton R. R. Division of Inland Waterways: New York-New Jersey Canal Section. Du-Wa-Missabe & Northern R'y. Duluth, South Shore & Atlantic R'y. Durham & Southern R. R.</p> <p>Eastern Texas R. R. East Jordan & Southern R. R. Elgin, Joliet & Eastern R'y. El Paso & Southwestern System: El Paso & Northeastern R. R. El Paso & Southwestern R. R. El Paso & Southwestern R. R. of Texas. Erie R. R. Escanaba & Lake Superior R. R. Evansville & Indianapolis R. R.</p> <p>Fairchild & Northeastern R. R. Fernwood & Gulf R. R. Florida East Coast R'y. Fort Dodge, Des Moines & Southern R'y. Fort Wayne, Cincinnati & Louisville R'y. Fort Worth & Denver City R'y. Fort Worth & Rio Grande R'y. Frankfort & Cincinnati R'y.</p>	<p>Gainesville Midland R. R. Galveston, Harrisburg & San Antonio R'y. (See Exception 60, page 99.) Galveston, Houston & Henderson R. R. Georgia R. R. Georgia & Florida R'y. Georgia, Florida & Alabama R'y. Georgia Northern R'y. Georgia Southern & Florida R'y. Gettysburg & Harrisburg R'y. Glennmore & Western R'y. Grand Rapids & Indiana R'y. Grand Trunk Lines in New England. Grand Trunk R'y System. Grand Trunk Western R'y. Great Northern R'y. Green Bay & Western R. R. Greenwich & Johnsonville R'y. Gulf & Ship Island R. R. Gulf, Colorado & Santa Fe R'y. Gulf, Mobile & Northern R. R. Gulf, Texas & Western R'y.</p> <p>Hartford & New York Transportation. Hartwell R'y. Hawkinsville & Florida Southern R. R. Hocking Valley R. R. Houston & Brazos Valley R'y. Houston & Shreveport R. R. Houston & Texas Central R. R. Houston East & West Texas R'y. Huntingdon & Broad Top Mountain R. R.</p> <p>Iberia & Vermillion R. R. Illinois Central R. R. Illinois Terminal R. R. Indiana Harbor Belt R. R. International & Great Northern R'y. Interstate R. R. Iowa & St. Louis R'y. Ironton R. R.</p> <p>Kalamazoo, Lake Shore & Chicago R. R. Kaukauna & Michigan R'y. Kansas City, Clinton & Springfield R'y. Kansas City, Mexico & Orient R. R. Kansas City, Mexico & Orient R. R. of Texas. Kansas City Southern R'y. Kansas Southwestern R'y. Keweenaw, Green Bay & Western R. R.</p> <p>La Crosse & Southeastern R'y. Lake Charles & Northern R. R. Lake Erie & Western R. R. Lake Superior & Ishpeming R'y. Lawrenceville Branch R'y. Lehigh & Hudson River R'y. Lehigh & New England R. R. Lehigh Valley R. R. Litchfield & Madison R'y.</p>
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▲See Absorption Notice I. C. C. No. 2 of the Grand Trunk Lines in New England, dated October 14, 1918.



PARTICIPATING CARRIERS—Continued.

LIST A—Concluded.

Long Island R. R.
Lorain & West Virginia R'y.
Lorian, Ashland & Southern R. R.
Los Angeles & Salt Lake R. R.
Louisiana & Arkansas R'y.
Louisiana Railway & Navigation.
Louisiana Southern R'y.
Louisiana Western R. R.
Louisville & Nashville R. R.
Louisville Bridge & Terminal.
Louisville, Henderson & St. Louis
R'y.

Macon, Dublin & Savannah R. R.
Maine Central R. R.
Manchester & Oneida R'y.
Manistee & Northeastern R. R.
Manistique & Lake Superior R. R.
Marquette & Bessemer Dock & Navi-
gation.
Maryland & Pennsylvania R. R.
Maryland, Delaware & Virginia R'y.
Maxton, Alma & Southbound R. R.
Memphis, Dallas & Gulf R. R.
Meridian & Memphis R'y.
Michigan Central R. R.
Midland Valley R. R.
Mineral Range R. R.
Minneapolis & St. Louis R. R.
Minneapolis, St. Paul & Sault Ste.
Marie R'y. (See Exception 77,
page 100.)
Minnesota & International R'y.
Mississippi Central R. R.
Missouri & North Arkansas R. R.
Missouri, Kansas & Texas R'y.
Missouri, Kansas & Texas R'y of
Texas.
Missouri, Oklahoma & Gulf R. R.
Missouri, Oklahoma & Gulf R. R. of
Texas.
Missouri Pacific R. R.
Mobile & Ohio R. R.
Monongahela R'y.
Montpelier & Wells River R. R.
Morgan's Louisiana & Texas Railroad
& Steamship.
Morgantown & Kingwood R. R.
Munising, Marquette & Southeast-
ern R'y.

Nashville, Chattanooga & St. Louis
R'y.
Natchez & Southern R'y.
New England Steamship.
New Haven & Northern R. R.
New Jersey & New York R. R.
New Jersey, Indiana & Illinois R. R.
New Orleans & Northeastern R. R.
New Orleans Great Northern R. R.
New Orleans, Texas & Mexico R'y.
New York & Long Branch R. R.
New York Central R. R.
New York, Chicago & St. Louis R. R.
New York, New Haven & Hartford
R. R.
New York, Ontario & Western R'y.
New York, Philadelphia & Norfolk
R. R.
New York, Susquehanna & Western
R. R.
Norfolk & Western R'y.

Norfolk Southern R. R.
Northern Alabama R'y.
Northern Ohio R'y.
Northern Pacific R'y.
Northwestern Pacific R. R.

Ocean Steamship of Savannah.
Old Dominion Steamship.
Orange & Northwestern R. R.
Oregon Short Line R. R. (See Excep-
tion 80, page 101).

Panhandle & Santa Fe R. y.
Paris & Great Northern R. R.
Paris & Mt. Pleasant R. R.
Pennsylvania R. R.—Eastern Lines.
Pennsylvania R. R.—Western Lines.
Peoria R'y Terminal.
Pere Marquette R. R.
Philadelphia & Reading R'y.
Pickens R. R.
Piedmont & Northern R'y.
Pittsburgh & Lake Erie R. R.
Pittsburgh & Shawmut R. R.
Pittsburgh & West Virginia R'y.
Pittsburgh, Chartiers & Youghio-
heny R'y.
Pittsburgh, Cincinnati, Chicago &
St. Louis R. R.
Pittsburgh, Lisbon & Western R. R.
Pontiac, Oxford & Northern R. R.

Quanah, Acme & Pacific R'y.
Quincy, Omaha & Kansas City R. R.

Raleigh & Charleston R. R.
Randolph & Cumberland R'y.
Rapid R. R., The.
Richmond, Fredericksburg & Poto-
mac R. R.
Rio Grande, El Paso & San Te. R. R.
Rockingham R. R.
Rock Island Southern R'y.
Roscoe, Snyder & Pacific R'y.
Rutland R. R.

St. Johnsbury & Lake Champlain
R. R.
St. Joseph & Grand Island R'y.
St. Louis, Brownsville & Mexico R. R.
St. Louis, Kennett & Southeastern
R. R.
St. Louis Merchants Bridge Terminal
R. R.
St. Louis-San Francisco R'y.
St. Louis, San Francisco & Texas R. R.
St. Louis Southwestern R'y.
St. Louis Southwestern R'y of Texas.
Salina Northern R. R.
San Antonio & Aransas Pass R. R.
San Antonio, Uvalde & Gulf R. R.
Savannah & Atlanta R. R.
Seaboard Air Line R. R.
Southern Pacific R. R. (See Ex-
ceptions 95, 100, 105 and 110, pages
100 and 101.)
Southern Pacific Steamship Line.
Southern R'y.

Southern R'y in Mississippi.
South Georgia R'y.
South Manchester R. R.
Spokane, Portland & Seattle R'y.
Staten Island Rapid Transit R'y.
Sunset Railway.
Susquehanna & New York R. R.

Tallulah Falls R'y.
Tampa Northern R. R.
Tennessee, Alabama & Georgia R. R.
Tennessee, Central R. R.
Terminal R. R. Ass'n of St. Louis.
Texarkana & Fort Smith R'y.
Texas & New Orleans R. R.
Texas & Pacific R'y.
Texas Midland R. R.
Tidewater Southern R'y.
Toledo & Ohio Central R'y.
Toledo, Peoria & Western R'y.
Toledo, St. Louis & Western R. R.
Toledo Terminal R. R.
Trinity & Brazos Valley R'y.

Union Pacific R. R. (See Exception
127, page 101.)
Union R'y (Memphis, Tenn.).

Valley R. R. of Virginia.
Vicksburg, Shreveport & Pacific R'y.
Virginian R'y.

Wabash R'y.
Washington & Vandemere R. R.
Washington Southern R'y.
Waterloo, Cedar Falls & Northern
R'y.
Watertown & Sioux Falls R'y.
Waupaca-Trempealeau Bay R'y.
Weatherford, Mineral Wells & North-
western R'y.
Western & Atlantic R. R.
Western Allegheny R. R.
Western Maryland R'y.
Western Pacific R. R. (See Exception
135, page 101.)
Western R'y of Alabama.
West Jersey & Seashore R. R.
West Shore R. R.
West Side Belt R. R.
Wheeling & Lake Erie R. R.
White River R. R. (Vermont).
Wichita Falls & Northwestern R'y.
Wichita Valley R'y.
Wiggins Ferry.
Wilkes-Barre & Eastern R. R.
Williams Valley R. R.
Winston-Salem Southbound R'y.
Wood River Branch R. R.
Wrightsville & Tennille R. R.

Yazoo & Mississippi Valley R. R.
Zanesville & Western R'y.

PARTICIPATING CARRIERS—Continued.

PARTICIPATING CARRIERS (LIST B).

The following carriers not under Federal control are party to this issue under power-of-attorney or the form and number of concurrence opposite name of carriers.

NAME OF CARRIER	Powers of Attorney issued to R. H. Countiss as Agent and Attorney and filed with the Interstate Commerce Commission (Except as noted)	NAME OF CARRIER	Powers of Attorney issued to R. H. Countiss as Agent and Attorney, and filed with the Interstate Commerce Commission (Except as noted)
	FX1-No. (Except as noted)		FX1-No. (Except as noted)
Aberdeen & Rockfish R. R.	20	Chicago, West Pullman & Southern R. R.	7
Alexandria & Western R'y	3	Clarendon & Pittsford R. R. Co. (See Exception 36, page 99)	10
Anthony & Northern R'y Co.	1	Cliffsider R. R. Co.	6
Aransas Harbor Terminal R'y	6	Clinton, Davenport & Muscatine R'y Co. (See Exception 40, page 99)	9
Arizona & New Mexico R'y Co.	20	Clyde Steamship Co.	22
Arizona Southern R. R. Co.	7	Colorado & South-Eastern R. R.	21
Arkansas & Louisiana Midland R'y Co.	51	Colorado & Wyoming R'y	7
Atlanta & St. Andrews Bay R'y	*FX7-No. 32	Colt's Express Co.	3
Baltimore & Eastern Shore Transportation Co.	5	Columbia, Newberry & Laurens R. R.	30
Bamberg, Ehrhardt & Walterboro R'y	14	Cornwall R. R. Co.	23
Bauxite & Northern R'y	6 (Cor.)	Crosby Transportation Co.	9
Benton Transit Co.	37	Crittenden R. R.	2
Birmingham & Atlantic R. R. Co. (Geo. R. R. Williams, Receiver)	23	Crowley Launch & Tugboat Co.	2
Birmingham Southern R. R. Co.	12	Dansville & Mt. Morris R. R. (A. S. Murray, Jr., Receiver)	23
Bloomsburg & Sullivan R. R. Co.	21	Dayton, Toledo & Chicago R'y Co.	6
Boston & Gloucester Steamboat Co.	21	Deering Southwestern R. R.	10
Boston & Maine R. R. (in Canada) (J. H. Hustis, Receiver)	*FX8-No. 13	De Queen & Eastern R. R. Co.	9
Brillstone R. R. & Canal Co.	4	Doniphan, Kemest & Searcy R'y	9
Bullfrog-Goldfield R. R. (See Exception 126, page 101)	8	Duluth, Winnipeg & Pacific R'y (See Exception 50, page 99)	W-7
Bush Line (Geo. W. Bush & Sons Co.)	14	Durham & South Carolina R. R. Co.	16
Bush Terminal R. R. Co.	38		
Butler County R. R. Co.	9		
Cairo, Truman & Southern R. R. Co.	5	Eastern Steamship Lines, Inc.	11
Cambria & Indiana R. R. Co.	6	Eastport Transport Co.	4
Canadian National Railways (Lines Westfort, Armstrong, Ont., and East thereof)	2-3	East Tennessee & Western North Carolina R. R.	21
Canadian National R'ys (Lines Port Arthur, Armstrong, Ont., and West thereof)	W-7	Edgemoor & Manetta R'y	9
Canadian Pacific Car & Passenger Transfer Co., Ltd.	3	El Dorado & Wesson R'y Co.	6
Canadian Pacific R'y	31	E. V. Rideout Co.	5
Carrollton & Worthville R. R. Co.	22		
Catskill & New York Steamboat Co., Ltd. (Charles M. Engle, Eben E. Olcott and Edward J. Dowling, Receivers)	35	##Fairport, Painesville & Eastern R. R. (See Exception 55, page 99)	11
Cedar Rapids & Iowa City R'y	13	Fonda, Johnstown & Gloversville R. R. Co.	18
Central California Traction Co.	7	Fordyce & Princeton R. R.	5
Central-Hudson Steamboat Co.	6	Fort Smith & Western R. R. Co. (Arthur L. Mills, Receiver)	11
Central Vermont R'y (in Canada)	15	Fourche River Valley & Indian Territory R'y	8
Central R'y of Arkansas	3 (Cor.)	Franklin & Abbeville R'y Co. (See Exception 55, page 99)	10
Chattahoochee Valley R. R.	11	Fresno Interurban R'y	4
Chester Shipping Co.	1		
Chestnut Ridge R'y Co.	15		
Chicago & Illinois Midland R'y	16		
Chicago & Illinois Western R. R.	9		
Chicago & South Haven Steamship Co.	5		
Chicago, Racine & Milwaukee Line	38	Galesburg & Western R. R. Co.	38
		Georgia Southwestern & Gulf R. R.	32
		Goodrich Transit Co.	41

*Issued to carriers for which R. H. Countiss is Agent and Attorney.
N. B.—For Explanation of other Characters, see page 93.

PARTICIPATING CARRIERS—Continued.

LIST B—Continued.

NAME OF CARRIER	Powers of Attorney issued to R. H. Countiss as Agent and Attorney and filed with the Interstate Commerce Commission (Except as noted)	FX1-No. (Except as noted)	NAME OF CARRIER	Powers of Attorney issued to R. H. Countiss as Agent and Attorney, and filed with the Interstate Commerce Commission (Commission Except as noted)
Gould Southwestern R'y Co. (W. H. Roberts, Receiver).....	8		Lancaster & Chester R'y.....	28
Grafton & Upton R. R. Co.....	26		L'Anguille River R'y Co.....	3
Graham & Morton Transportation Co. (The Michigan Trust Co., Receivers).....	28		Laurinburg & Southern R. R. Co.....	14
Grand Rapids, Grand Haven & Muskegon R'y.....			Lawndale R'y & Industrial Co.....	10
Grand Trunk Railway System (Lines East of Detroit and St. Clair Rivers).....	17		Leavenworth & Topeka R. R. Co.....	5
Great Northern Pacific Steamship Co. (See Exception 70, page 100).....	1		Little Rock, Maumelle & Western R. R. Louisiana & North West R. R. (Geo. W. Hunter, Receiver).....	10
Great Western R'y Co.....	12		Louisiana & Pacific R'y Co.....	14
Gulf & Sabine River R. R. Co. (Fullerton Division).....	10		Louisiana & Pine Bluff R'y Co.....	27
Gulf, Florida & Alabama R'y Co. (John T. Steele, Receiver).....	16		Lufkin, Hemphill & Gulf R'y Co.....	7
Hagerstown & Frederick R'y Co.....	28			6
Hardwick & Woodbury R. R. *Harlem & Morrisania Transportation Line.....	2			
Helena, Parkin & Northern R'y.....	10		Macon & Birmingham R'y Co. (H. W. Miller, Receiver).....	34
Hill Steamboat Line.....	13		Maine Central R. R. (in Canada).....	▲FX8-No. G-10
Hoboken Manufacturers' R. R.....	30		Maine Coast Co.....	14
Hudson Navigation Co.....	62		Mallory Steamship Co.....	48
Illinois Northern R'y.....			Mansfield R'y & Transportation Co.....	5
Illinois Southern R'y (William W. Wheelock, Receiver).....	37		Manufacturers' R'y.....	10
Inter-Urban R'y Co.....	21		Marinette, Tomahawk & Western R. R. Co.....	4
Iowa Southern Utilities Co.....	26		Marion R'y Corporation.....	29
Jonesboro, Lake City & Eastern R. R.....	9		Mason City & Clear Lake R'y Co.....	15
Kanawha, Glen Jean & Eastern R. R. Co.....	7		Michigan Central R. R. (in Canada).....	▲FX7-No. 5
Kane & Elk R. R. Co.....	11		Michigan R'y Co.....	10
Kansas City & Memphis R'y Co. (J. E. Feiker and R. C. Bright, Receivers).....	13		Middlesex Transportation Co.....	9
Kansas City, Kaw Valley & Western R'y Co. Kansas City Northwestern R. R. (L. S. Cass, Receiver).....	1		Mineral Point & Northern R'y Co.....	9
Kinder & Northwestern R. R. Co. (See Exception 75, page 100).....	6		Minneapolis, Northfield & Southern R'y.....	15
Lackawanna & Wyoming Valley R. R. Co.....	14		Mississippi River & Bonne Terre R'y.....	12
Lake Erie & Northern R'y.....	31		Modesto & Empire Traction Co.....	7
Lakeside & Marblehead R. R. Co.....	10		Montour R. R. Co.....	36
	28		Morenci Southern R'y Co.....	5
♦ELIMINATED. Not a common carrier.			Morriston & Erie R. R.....	20
*Published for the Director General of Railroads under authority of Section 2 of Circular No. 1-B of the Director, Division of Traffic, United States Railroad Administration, dated February 1, 1919. See Note D on title page hereof.			Moshassuck Valley R. R.....	18
▲Issued to carriers for which R. H. Countiss, is Agent and Attorney.			Mt. Jewett, Kinsua & Riterville R. R. Co.....	12
#For Explanation see page 93.			Muscatine, Burlington & Southern R. R. Co.....	9
			Nevada-California-Oregon R'y.....	6
			Nevada Northern R'y.....	2
			Newark Express & Transportation Co.....	9
			New Mexico Central R'y Co.....	11
			New York & Hastings Steamboat Co.....	4
			New York & New Jersey Steamboat Co.....	5
			New York Central R. R. (in Canada).....	▲FX8-N. Y. C. No. 5
			New York, Westchester & Boston R'y Co. Norfolk & Washington (D. C.) Steamboat Co.....	10
			North & East River Steamboat Co.....	16
			Northern Michigan Transportation Co.....	4
			North Louisiana & Gulf R. R. Co.....	36
				8

♦ELIMINATED. Not a common carrier.

*Published for the Director General of Railroads under authority of Section 2 of Circular No. 1-B of the Director, Division of Traffic, United States Railroad Administration, dated February 1, 1919. See Note D on title page hereof.

▲Issued to carriers for which R. H. Countiss, is Agent and Attorney.

#For Explanation see page 93.

PARTICIPATING CARRIERS—Concluded.

LIST B—Concluded.

NAME OF CARRIER	Powers of Attorney issued to R. H. Countiss as Agent and Attorney and filed with the Interstate Commerce Commission (Except as noted)	FX1-No. (Except as noted)	NAME OF CARRIER	Powers of Attorney issued to R. H. Countiss as Agent and Attorney, and filed with the Interstate Commerce Commission (Except as noted)	FX1-No. (Except as noted)
Oakdale & Gulf R'y Co.		8	Southwestern R'y Co. (A. C. Parks, Receiver)	20	
Oakland, Antioch & Eastern R'y		5	Stanley, Merrill & Phillips R'y Co.	8	
Ocilla Southern R. R. Co. (M. W. Garbutt, J. A. J. Henderson and J. F. Gray, Receivers)		20	Starin New Haven Line	9	
Oklahoma, New Mexico & Pacific R'y Co.		3	Stewartstown R. R.	3	
Okmulgee Northern R'y		4	*Stones Express, Incorporated	11	
Orangeburg R'y (C. E. Denniston, Receiver)		11	Sugar Land R'y Co	11	
Ouachita Valley R'y Co		7			
Pacific Electric R'y Co. (See Exception 85, page 100)			Texas City Terminal Co.	17	
Pacific Steamship Co.		12	Texas Mexican R'y Co.	16	
Pascagoula Moss Point Northern R. R.		5	Texas, Oklahoma & Eastern R. R.	2	
Peninsular & Occidental Steamship Co.		▲FX7-No. 2	Texas Short Line R'y Co	13	
Peninsular R'y Co. (See Exception 90, page 100)		8	Texas South-Eastern R. R. Co.	110	
Pere Marquette Line Steamers		5	Texas State R. R.	6	
Pere Marquette R. R. (in Canada)		▲FX8-No. 16	Thornton & Alexandria R'y Co	5	
Petaluma & Santa Rosa R. R. Co.		3	Tionesta Valley R'y Co	31	
Pittsburg, Shawmut & Northern R. R. Co. (Frank Sullivan Smith, Receiver)		20	Tonopah & Goldfield R. R. (See Exception 125, page 101)	4	
Port Chester Transportation Co.		13	Tonopah & Tidewater R. R. (See Exception 125, page 101)	7	
Prattsburgh R'y Corporation		10	Toronto, Hamilton & Buffalo R'y	29	
Prescott & Northwestern R. R. Co.		3	Tremont & Gulf R'y	13	
Rahway Valley Co.		5	Trenton Transportation Co.	11	
Raritan River R. R. Co.		29	Tucson, Cornelia & Gila Bend R. R. Co.	2	
Red River & Gulf R. R. Co.		16			
Reynoldsville & Falls Creek R. R.		19			
Rhode Island Company (Frank H. Swan, Theodore Francis Green, Zenas W. Bliss, Receivers)		20	Unadilla Valley R'y	15	
Rio Grande & Eagle Pass R'y Co.		D-12	Union & Glen Springs R. R. Co.	10	
Roanoke R'y Co.		6	Union Point & White Plains R. R.	▲FX7-No. 9	
Eutland R. R. (in Canada)		▲FX8-No. 16	Visalia Electric R. R. Co. (See Exception 130, page 101)	9	
Sacramento Northern R. R.		4	Wabash R'y (in Canada)	▲FX7-No. 21	
St. Louis & Hannibal R. R. Co.		4	Ware Shoals R. R.	11	
St. Louis, El Reno & Western R'y Co. (Arthur L. Mills, Receiver)		10	Warren & Ouachita Valley R'y Co	14	
Salt Lake & Utah R. R.		7	Warren, Johnsville & Saline River R. R.	2	
San Diego & Arizona R'y Co.		11	Warrenton R. R. Co.	8	
Sand Springs R'y Co.		8	Washington, Baltimore & Annapolis Electric R. R. Co.	14	
Sandy River & Rangeley Lakes R. R.		9	Washington, Brandywine & Point Lookout R. R. Co.	2	
Santa Maria Valley R. R.		1	Wilkes-Barre & Hazelton R'y Co.	16	
Saugerties & New York Steamboat Co.		8	Wisconsin & Michigan R. R. Co. (S. N. Harrison, Receiver)	C-1	
①Sidell & Olney R. R. Co.		37	Wisconsin & Northern R. R. Co.	7	
South Brooklyn R'y Co.		A-3	Wright & Cobb Transportation Co.	4	
Southern Pacific R. R. Co. of Mexico		5	Youngstown & Ohio River R. R.	23	
Southern Steamship Co.					

①ELIMINATED. Ceased operation.

①For Explanation, see page 93.

★Issued under authority of and in compliance with order of Interstate Commerce Commission in Case No. 7244 of January 12, 1918. Must be maintained for a period of two years from March 15, 1918.

▲Issued to carriers for which R. H. Countiss is Agent and Attorney.



Index of Articles for which Commodity Rates are provided on pages 94 and 148 to 392, inclusive.

ARTICLES	Item No.	ARTICLES	Item No.	ARTICLES	Item No.
Packing, raw-hide.....	2575	Paper, crepe.....	2705	Pectin, fruit.....	2760
Packing, rubber.....	1815	Paper, deadening.....	2695, 2715	Pectin, vegetable.....	2760
Packing, rubber and canvas.....	1815	Paper, deitila manila.....	2655, 2720	Pedestals, floor, cash register.....	670, 675
Packing, soapstone.....	2575	Paper, drawing.....	2655, 2730	Peel, citron.....	1235
Packing, straw.....	2570, 2575	Paper, emery.....	1590, 1595	Peel, lemon.....	1235
Padding, table, quilted cotton.....	1020	Paper, flint.....	1590, 1595	Peel, orange.....	1235
Pads, collar.....	1695	Paper, fly.....	2675, 2695	Peels, bakers'.....	3755, 4538
Pads, cotton.....	1000	Paper, fruit, 2645, 2650, 2655, 2730, 4442		Pelets, goat.....	1775
Pads, harness.....	1695	Paper, gummed.....	2675, 2695	Pelets, sheep.....	1775, 4612
Pads, horseshoe.....	2610	Paper, indented, 2650, 2665, 2715, 3040, 4444, 4482		Pelets, sheep, green.....	1770
Pads, sweat.....	1695	Paper, insect.....	2675, 2695	Pens, stable.....	2170
Pads, table, quilted cotton.....	1020	Paper, insert.....	2685	Pepper.....	3245
Pails, sheet iron or steel.....	3400	Paper, insulating.....	2695, 2715	Pepper, Sauge, 41, 620, 2765, 4040, 4042, 4044, 4758	
Pails, paper.....	2660, 3755, 4538	Paper, lace.....	2705	Peppers, green.....	1265
Pails, pulpboard.....	2660	Paper, ledger.....	2655, 2725	Peppers, pickled.....	2765
Pails, sheet iron.....	3400, 3405	Paper, lincrusta walton.....	2710	Periodicals, paper-bound.....	2640
Pails, tin.....	3360, 3365, 4524	Paper, linen.....	2655, 2725	Personal effects (with household goods).....	1820, 4232, 4764
Pails (with mop wringer attachment).....	3755, 4538	Paper, lithographed, book binding, 2655, 2675		Pestles, iron.....	1560
Pails, wooden or fibre.....	3755, 4538	Paper, monotype.....	2650, 2655, 2675, 2695	Petroleum Products.....	2550, 4640, 4642
Pails, woodpulp.....	2660	Paper, news.....	2655, 2730	Pews, church.....	1360, 1194, 4196, 4198
Paint, as described in, 2615 to 2635, incl., 4440		Paper, poster.....	2655, 2730	Phosphate, tri-sodium.....	.905
Paint, chemical, dry.....	2620, 2630	Paper, ribbon.....	2685	Pianos.....	2455, 2460
Paint, chemical, in oil.....	2620, 2630	Paper, sand.....	1590, 1595	Pianos, automatic.....	2455
Paint, earth, dry.....	2620, 2630, 4440	Paper (scrap or waste).....	2220	Pianos, mechanical.....	2455
Paint, earth, in oil.....	2620, 2630	Paper, shelf.....	2650, 2720	Pianos (with household goods), 1820, 4232, 4764	
Paint, lead and zinc, combined, dry, 2620, 2630		Paper, stamped, decorating.....	2705	Pickaroons.....	1635, 1650
Paint, lead and zinc, combined, in oil.....	2620, 2630	Paper, tailors' pattern, 2645, 2655, 2730, 4442		Pickles.....	2765
Paint, lead, in oil.....	2620, 2630	Paper, tissue.....	2645, 2650, 2730, 4442	Pickles, canned, 41, 620, 4040, 4042, 4044, 4758	
Paint, lithopone.....	2620, 2630	Paper, toilet.....	2650, 2700, 2720, 2735	Pickle, kraut.....	2765
Paint, mineral, dry.....	2620, 2630	Paper, veneering.....	2710	Picks.....	1635, 1640
Paint, mineral, in oil.....	2620, 2630	Paper, wall.....	2710	Piercates.....	1, 1125
Paint, prepared, in oil.....	2620, 2630	Paper, wrapping, 2645, 2650, 2655, 2695, 2730, 2745, 4442		Pieces, leather.....	2235 to 2250, incl.
Paint, zinc, dry.....	2620, 2630	Paper, writing.....	2655, 2675, 2725	Pigs' feet, 2580, 2585, 4426 to 4436, incl.	
Pajamas, linen or cotton.....	.855	Paperticles.....	2675, 2695	Pigs' feet, pickled.....	4660, 4782
Pans, agitators.....	39, 4408	Parers, apple.....	1555	Piling, iron or steel, 2175, 4340 to 4354, incl., 4374, 4376	
Pans, amalgamating.....	39, 4408	Parers, peach.....	1555	Pillow cases, cotton.....	1000
Pans, clean-up.....	39, 4408	Patis Green.....	1850, 1851	Pillows, feather.....	1145
Pans, dripping.....	3400, 3410, 4790	Partitions, rolling door.....	975	Pimentos, canned, 41, 620, 4040, 4042, 4044, 4758	
Pans, drip, water cooler.....	3665	Partitions, store.....	1400, 4206, 4208, 4210	Pineapples.....	1245, 4606
Pans, drip, with tanks.....	2195	Partitions, urinal stall, iron or steel, 2810		Pinch bars.....	1985
Pans, frying.....	3405	Partitions, vault, iron.....	2215	Pinions.....	1095
Pans, gem, cast-iron.....	1780	Partitions, water closet stall, iron or steel.....	2810	Pins.....	1025, 1110, 2995
Pans, ice.....	3400	Parts, agricultural implement, as described in.....	365, 4004, 4750	Pins, belaying.....	3170, 3175
Pans, iron, galvanized.....	3	Parts, automobile, metal.....	3635	Pins, clothes.....	870, 3755, 4538
Pans, long, cast-iron.....	1780	Parts, bed, brass, iron or steel.....	575	Pins, cross arm.....	1070, 4144, 4146
Pans, mining.....	3400, 3410	Parts, cash register.....	670, 675	Pins, dowel.....	1330, 3755, 4538
Pans, sauce, cast-iron.....	1780	Parts, cultivator, iron or steel.....	365	Pins, escutcheon.....	1553
Pans, settler.....	39, 4408	Parts, dredging machine, as described in.....	980	Pins, hair, wire.....	1025
Pans, tire tube testing, galvanized iron.....	3400	Parts, farm wagon.....	4750	Pins, pole.....	1110
Pans, vacuum.....	2360	Parts, orchard heater.....	3400	Pins, railway.....	2995, 3000, 4474, 4476
Pans, wash.....	3405	Parts, plow (iron or steel).....	365	Pins, rolling, wooden or fibre.....	3755, 4538
Pans, wash, sheet iron or steel.....	3400	Parts, sewing machine.....	3155, 3160	Pins, tent.....	3350
Pants, cotton.....	.845	Parts, storage battery.....	1065	Pipe, brass, bronze or copper.....	.570
Paper and Articles of Paper, as described in, 2640 to 2745, incl., 4442, 4444, 4672		Parts, stove.....	1725, 4224, 4790	Pipe, east iron, 2125, 2995, 3000, 4326 to 4344, incl., 4346 to 4354, incl., 4364, 4766, 4776	
Paper, abrasive.....	1590, 1595	Parts, talking machine.....	3320	Pipe, chimney.....	.790, 800, 805
Paper, adding machine, 2650, 2655, 2675, 2695		Parts, typewriter.....	3545	Pipe, conductor, iron, 2035, 2040, 4292, 4294	
Paper, blotting.....	2650, 2720	Parts, vehicle, as described in, 3635, 3640, 3642, 3645		Pipe, conductor or riveted.....	.39, 4408
Paper, bond.....	2655, 2725	Parts, windmill.....	4750, 4752	Pipe, conduct, iron or steel.....	4772
Paper, book.....	2655, 2720, 2730	Paste, adhesive.....	1830 to 1845, incl.	Pipe, corrugated, iron, 2035, 2040, 4292, 4294	
Paper, building, asbestos.....	430, 4014	Paste, almond.....	910, 4126	Pipe, culvert, iron or steel.....	2040, 4294
Paper, building.....	2665, 3040, 4444, 4482	Paste, flour, dry.....	1830 to 1845, incl.	Pipe, iron, 1705, 2225, 2360, 4410, 4412, 4414	
Paper, carbonborundum.....	1590, 1595	Paste, Italian.....	2345	Pipe, iron, steel, 39, 2040, 4276, 4294, 4408	
Paper, check, for cash registers, 2650, 2655, 2675, 2695		Paste, tooth.....	.995	Pipe, lock bar, iron.....	2040, 4294
Paper, cigarette.....	2675, 2695	Pasteurizers, beer, 2355, 4400 to 4406, incl.		Pipe, riveted, iron.....	2040, 4294
Paper, cloth.....	2695	Peanuts.....	2750, 4674	Pipe, sewer.....	.820, 4104, 4106
Paper, cloth-lined.....	2675, 2695	Pears, dried.....	1225, 4548	Pipe, spiral-seam, iron.....	2040, 4294
Paper, corrugated, 2650, 2665, 2715, 3040, 4444, 4482		Peevies.....	1635, 1650		
Paper, cover.....	2655, 2720	Pebbles, grinding, 2375, 4416, 4592, 4594, 4596			

1. *Constitutive* of *cellular* *membrane* *proteins* *in* *normal* *and* *transformed* *cells*

2. *Protein* *kinase* *C*

3. *Protein* *kinase* *C*

4. *Protein* *kinase* *C*

5. *Protein* *kinase* *C*

6. *Protein* *kinase* *C*

7. *Protein* *kinase* *C*

8. *Protein* *kinase* *C*

9. *Protein* *kinase* *C*

10. *Protein* *kinase* *C*

11. *Protein* *kinase* *C*

12. *Protein* *kinase* *C*

13. *Protein* *kinase* *C*

14. *Protein* *kinase* *C*

POINTS FROM WHICH RATES NAMED HEREIN APPLY—Continued

OHIO—Concluded:

Mentor (Wood Co.)	Neapolis	Pettisville	Scott	Stockton	Versailles
Newash	Pikeville	(Van Wert Co.)	Stock Yards	Wagon Works	Wagon Works
New Bavaria	Piqua	Sedamsville	Stokes	Walbridge	Walbridge
New Bremen	Piqua Jct.	Seven Mile	Stoney Ridge	Waldner	Waldner
Miami	Pittsburg	Shaker	Storrs	Walnut Hills	Walnut Hills
Newburg	Plainville	Crossing	(Hamilton Co.)	Wapsaconeta	Wapsaconeta
Miamisburg	Plaza	Shandon	Strakers	Water Purifica- tion Works	Water Purifica- tion Works
Miami City	Pleasant Bend	Sharonville	Stryker	Waterville	Waterville
Miami Siding	Pleasant Hill	(Hamilton Co.)	Sugar Grove	Wauseon	Wauseon
Miamiville	Point Isabelle	Shasta	(Miami Co.)	Waynesville	Waynesville
Michigan	Portage	Sheleys	Sugar Ridge	Weavers	Weavers
Central Jct.	(Wood Co.)	Port Union	Summit	Webs	Webs
Middlepoint	Newkirk	Prairie Depot	(Hamilton Co.)	Wengerlawn	Wengerlawn
Middletown	New Madison	Pratts	Shillito	West Alexan- dria	West Alexan- dria
Middletown	New Paris	(Hancock Co.)	Street	West Carroll- ton	West Carroll- ton
Jct.	New Riegel	Prentiss	Sidney	West Chester	West Chester
Miles Switch	New Weston	(Putnam Co.)	Silver Creek	West Leipsic	West Leipsic
Millford	Ney	Pulaski	(Hardin Co.)	West Liberty	West Liberty
Millbury	Norris	Quincy	Silver Lake	West Man- chester	West Man- chester
Millers City	(Wood Co.)	Rapid Run	(Logan Co.)	West Milton	West Milton
Millersville	North	Rawson	Silverton	Westminster	Westminster
Mill Grove	Baltimore	Reading	Simms	Weston	Weston
(Warren Co.)	North Bond	Red Bank	Simonson	West Side	West Side
Milton	North Creek	Remington	Slater	West Sonora	West Sonora
(Wood Co.)	North Excello	Rendcomb Jct.	(Auglaize Co.)	West Toledo	West Toledo
Mina	Northwood	Rialto	Smith Street	West Unity	West Unity
Minster	Heights	Richards	Snyderville	Westville	Westville
Moats	Norwood Park	Richley	Somerville	Wharton	Wharton
Moffits	Oak Harbor	Richland	South	(Wyandot Co.)	White Water
Moline	Oakland	(Logan Co.)	Cumminsville	Park	Park
Monclova	(Warren Co.)	Rimer	South Dayton	Tontogany	Whitfield
Monroe	Oakley	Rising Sun	South Hart- well	Toussaint	Whithouse
(Butler Co.)	Oakridge	Roachton	South Leb- anon	Tower Hill	Whitmore
Montezuma	Oak Shade	Ridge Road	South Park	Townwood	(Wood Co.)
Montgomery	Oak Street	Rimer	(Montgomery Co.)	Trautman	Williamstown
(Hamilton Co.)	Oakview	Rising Sun	Rockdale	Trebein	Williston
Monticello	Oakwood	Roachton	Rockford	Trebein's	Willshire
Montpelier	Ohio City	Rockford	Rockwell	Tremont City	Winslow Park
Moors	Oil Center	Rosemoyne	Rocky Ridge	Trenton	Winton
(Coney Co.)	Okeana	Rosedale	Rosedale	Trombley	Winton Place
Moors	Okolona	(Defiance Co.)	(Hamilton Co.)	(Butler Co.)	Wisterman
Quarries	Oldtown	Roseims	Southworth	Trotwood	Woodington
Morris	(Green Co.)	Rosewood	Spafford	Troy	Woodlawn
(Allen Co.)	Osgood	Roslyn	Spencerville	(Miami Co.)	Woods
Morris	Ottawa	Rossburg	Springfield	Turtle Creek	Woodsdale
(Champaign Co.)	Ottokee	Rossford	Spring Valley	Twivedale	Woodside
Morrow	Ottoville	Rossmoyne	Standley	Twightwee	Woodville
Mortimer	Overpeck	Rouscups	Startwell	Union (Mont- gomery Co.)	(Sandusky Co.)
Moulton	Oxford	Roxanna	Steelton	Union Village	Worsville
Mt. Blanchard	Pandora	Rudolph	Steinmans	Unipolis	Wren
Mt. Cory	Park	Rushmore	St. Bernard	Urbana	Wyoming
Muhlhauer	(Warren Co.)	Patterson	Russell's Point	Van Buren	Xenia
Mungen	Park Place	Patterson	Russia	Valley Jct.	Yellow Springs
Muntanna	Patterson	(Hardin Co.)	(Shelby Co.)	Vanlue	Velerton
Murphy	Paulding	Pemberton	St. Johns	Van Wert	Yorkshire
(Hancock Co.)	Pemberton	Pemberville	St. Joseph	Vauhnsville	Zimmerman
Naomi	Pendleton	Santa Fe	(Hamilton Co.)	Venable	
Napoleon	Shop	Savona	St. Marys	Venedocia	
National Road	Perrysburg	Saylor Park	St. Paris		
(Montgomery Co.)		Schenks			
		Schumm			

ALL OTHER POINTS

OKLAHOMA:

Adair	Artie	Barbee	Big Cabin	Bokhoma	Bunch
Adams	Ashby	Barnett	Bismarck	Bokoshe	Busbyhead
Afton	Atlantic	Barron Fork	Bixby	Boswell	Canadian
Alderson	Ayetta	Bartlesville	Blanc Spur	Braden	(Pittsburg Co.)
Alsuma	Bache	Bedwell	Blanco	Braggs	Cartersville
America	Baker	Benson	Blocker	Briartown	Canton
Archibald	Ballard	Berlin	Blue Jacket	Broken Arrow	Catalil
Ardmore Jct.	Baltic	Bernice	Bluff	Broken Bow	Catoosa
Arkansas River	Baptist	Berryhill	Boggy	Brushy	

(CONCLUDED ON FOLLOWING PAGE.)

RATES
APPLICABLEGROUP
C
RATESGROUP
B
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RATES

With the following
and other like

OKLAHOMA—Concluded:

Chambers	Forney	Jackson	Monroe	Quapaw	Stillwell
Checotah	Fort Gibson	Switch	Moon	Quinton	Stone Bluff
Chelsea	Fort Towson	Jenks	Muldrow	Ramona	Stonebraker
Chercreek	Foyil	Johnsville	Murphy	R. B. Choate	Strang
Chert Ballast	Frink	Joneston	Muskogee	Spur	Summit
Pit	Gaither	Kanima	Narcissa	Reams	Superior
Choctie	Gans	Karrle	Neha	Red Bird	Swink
Chouteau	Gap	Keba	Nirine	Redlands	Taft
Claremore	Garnett	Keefeton	N. McAlester	Red Oak	Talala
Coal Creek	Garvin	Kelso	N. Muskogee	Reid's Spur	Thomasville
Coal Spur	Gasopolis	Kendall	Nowata	Rentieville	Tiawah
Coatlon	Gibson	Keota	Noxil	Reynolds	Tigler
Collinsville	Glenpool	Ketchum	Oak-ta-ha	Rogers (Mayes Co.)	Todd
Copan	Golden	Kinta	Ochelata		Traber
Cornell	Gore	Kiowa	O'Farrell		Tullahassee
Council Hill	Gowan	Krebs	Ogeechee	Rice	Tulsa
Coweta	Gravel Spur	Kusa	Okmulgee	Roby	Turley
Craig	Greenwood	Lefesber	Onspa	Rock Island	Tyrell
Crekola	Jct.	Leliaetta	Oolagah	Ross City	Unger
Creo	Hailey	Lenapah	Oseuwa	Rotary	Upson
Crowder	Haleyville	Leonard	Owen	Rowland	Valliant
Culp	Hamilton	Lequire	Ozark	Russell Creek	Vera
Dawes	Hanna	Limestone	Page	Sageeyah	Verdigris
Dawson	Hanson	Livingston	Panama	Salina	Vian
Delaware	Hartshowe	Locust Grove	Passing Spur	Sallisaw	Vinita
Denman	Haskell	Log Spur	Patterson	Sand Springs	Wagoner
Dewar	Hanto	Lopp	Spur	Sand Spur	Wainwright
Dewey	Haworth	Lutil	Peweeville	Sans Blois	Wann
Dow	Hay Ranch	Lyons	Lumber Spur	Savanna	Warner
Duvall	Henryetta	McAlester	Peno	Schulter	Watkins
Edgar	Heavener	McCurtain	Pensacola	Seaman	Watova
Eufaula	Hitchita	McDonald	Perry	Sequoyah	Watts
Eureka Coal Co.	Hodgens	McKay	Perryman	Shady Point	Welch
Co. Spur	Hoffman	Mackey	Petroleum	Shaft 3	Wells
Fairland	Houston	Macon	Pinolis	Shaft 7	Westville
Falls City	Howard Lum-	Marble City	Pittsburg	Shopton	White Oak
Fanshaw	ber Co. Spur	Marble Quarry	Poag	Skiatook	Wilburton
Fascine	Howden	Massey	Poison	Slope	Williams
Featherston	Howe	Matoaka	Port	Son	Windsor
Ferguson Cont.	Hughes	Mazil	Porter	Soper	Wirth
Co. Spur	Hulwe	Mekke	(Wayne Co.)	So. Coffeyville	Wister
Flint Siding	Huntley	Miami	Forum	Sperry	Wyandotte
Flush	Idabell	Millerton	Potter	Spiro	Wybark
Fogels Spur	Indianola	Milton	Poteau	Sputter	Yahola
Foreman's	Inola	Mohawk	Pryor	Stevens	Yonkers

GROUP F RATES

ALL OTHER POINTS.....**PENNSYLVANIA:**

Acheson	Anderson Road	Baird	Beaver Road	Blackburn	Branchton
Adamsville	Annandale	Bagdad	Becks Run	Blacks Run	Brandon
Aiken	Apollo	Bagdad	Beschmont	Blackstone	(Venango Co.)
(Allegheny Co.)	Arda	Colliery	Belle Bridge	Mine	Brevard
Akeley	Argentine	Baggeray	Belle Valley	Blythedale	Bridgeville
Aladin	Argyle	Bakerstown	Belle Vernon	Bonnie Brook	Bridgewater
Albion	Arnold (West-	Bamford	Belleverue (Alle-	(Butler Co.)	(Beaver Co.)
Aliquippa	moileland Co.)	(Washington Co.)	gheny Co.)	Borland	Brightwood
Allegheny	Banksville	Ben Avon	Ben Avon	Boston	Brilliant
Allentown	Arona	Bennett	Bentleyville	Boughton	Brinker
Allison Park	Aspinwall	Banksville Jct.	Bessemer	Bouquet	Briquette
Allsworth	Astral	Barking	Best Siding	Bovard	Browns
Alpsville	Atlantic	Barnes Cross-	Biddle	Bower Hill	(Allegheny Co.)
Alton	Atwells Cross-	ing	Big Ben	Boyce	Boyce
(McKean Co.)	Bartley	Baum	Big Shanty	(McKean Co.)	Brownsdale
Amass	Avalon	Beading	Bingham	Brackinridge	Brownsville
(Mercer Co.)	Avella	Beans Hill	(McKean Co.)	Braddock	Road
Ambridge	Avonmore	Bear Lake	Birmingham	Bradford	Bruceton
Anderson	(Westmore-	Beatty	(Allegheny Co.)	Breasburn	Bruin
(Washington Co.)	land Co.)	Beaver	Bishop	Branch	Bryant
Anderson Jct.	Baden	Beaver Falls		(Mercer Co.)	Buchanan

GROUP H RATES

GROUP B RATES

(CONTINUED ON FOLLOWING PAGE.)

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LIST OF STATIONS IN ARIZONA, CALIFORNIA, MEXICO, NEVADA, NEW MEXICO, OREGON AND UTAH
TO WHICH RATES APPLY—Continued.

STATIONS	RAILROAD LOCATION	CLASS (See pages 112 to 145, inclusive) SCALE No.	COMMODITY RATE BASES (For Explanation of Notes, see page 94)	NOTES (For Explanation, see page 94)	WESTERN GATEWAYS (For Key, see pages 91 and 92)
Grand Terrace.....Cal.	L. A. & S. L.	47, 200	1, 3		4, 12, 23, 24, 25, 26
Grand Terrace.....Cal.	P. E.	47, 200	1, 3		19, 23, 24, 26
Grand Terrace.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 12, 19
Grand View.....Ariz.	A. T. & S. F.		2, 3	4	1
Grange.....Cal.	T. S.	47, 200	1, 3		23, 24, 25, 26, 32
Granger.....Cal.	C. L. & T.	47, 200	1, 3		32
Granger.....Cal.	E. V. R.	47, 200	1, 3		18, 22, 32
Granger.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 10, 12, 32
Granite.....Ariz.	A. T. & S. F.		2, 3	4	1
Granite Point.....Nev.	S. P.	116, 235	2, 3		6
Grant.....Cal.	N. W. P.	47, 200	1		12, 15, 23, 24, 25, 26, 27
Grants.....N. M.	A. T. & S. F.	124	2, 3		11
Grants.....Utah	W. P.	241			6, 7, 8, 9, 12, 32
Granz.....Cal.	S. P.	47, 200	1		7, 8, 9
Grape.....Cal.	S. P.	47, 200	1		19, 23, 24, 26
Grapeland.....Cal.	P. E.	47, 200	1, 3		6, 7, 8, 9, 10, 12, 32
Grapit.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 10, 12, 32
Grass Lake.....Cal.	S. P.	47, 200	Note 1	1	13, 30, 31, 32, 36
Gratton.....Cal.	P. & S. R.	47, 200	1		6, 7, 8, 9, 12, 19
Gratto.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 12, 32
Gravel.....Cal.	S. P.	47, 200	1		19, 23, 24, 26
Gravel Pit.....Cal.	P. E.	47, 200	1, 3		6, 7, 8, 9, 12, 32
Graves.....Cal.	S. P.	47, 200	1, 3		12, 15, 23, 24, 25, 26, 27
Green Brae.....Cal.	N. W. P.	47, 200	1		23, 24, 25, 26, 32
Greenslade.....Cal.	T. S.	47, 200	1, 3		12, 15, 23, 24, 25, 26, 27
Green Valley.....Cal.	N. W. P.	47, 200	1		12, 15, 23, 24, 25, 26, 27
Greenwood.....Cal.	N. W. P.	47, 200	1, 3		6, 7, 8, 9, 10, 12, 32
Greenwood.....Cal.	S. P.	47, 200	1, 3		11, 12, 23, 24, 25, 26
Greer.....Cal.	W. P.	47, 200	1, 3		1, 23, 24, 25, 26, 32
Gregg.....Cal.	A. T. & S. F.	47, 200	1, 3		6, 7, 8, 9, 10, 12, 32
Grenada.....Cal.	S. P.	47, 200	1, 3		23, 24, 26
Grey Rocks.....Cal.	V. E.	47, 200	1, 3		6, 7, 8, 9, 12, 32
Greystone.....Cal.	S. P.	47, 200	1		6, 7, 8, 9, 10, 12, 32
Gridley.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 10, 12, 32
Grimes.....Cal.	S. P.	47, 200	1		6, 7, 8, 9, 10, 12, 32
Grommet.....Cal.	A. T. & S. F.	47, 200	1, 3	4	1
Groome.....Utah	S. P.	152, 208	2, 3		6
Grossmont (Alta)....Cal.	S. D. & A.	47, 200	1		12, 20, 28
Grouse.....Nev.	S. P.		2, 3		6
Grover.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 12
Guadalupe.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 12
Guasti.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 12, 19
Guerneville.....Cal.	N. W. P.	47, 200	1		12, 15, 23, 24, 25, 26, 27
Guernewood Park.....Cal.	N. W. P.	47, 200	1		12, 15, 23, 24, 25, 26, 27
Guernsey.....Cal.	A. T. & S. F.	47, 200	1, 3		1, 23, 24, 25, 26, 32
Guinda.....Cal.	S. P.	47, 200	1		6, 7, 8, 9, 10, 12, 32
Gustine.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 12, 32
Guthrie.....Ariz.	A. & N. M.	41	Note 5	5	17, 24, 26
Guthrie.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 10, 12, 32
Gypsum.....Cal.	A. T. & S. F.	47, 200	1, 3		1, 19, 23, 24, 26, 26
Hachita.....N. M.	E. P. & S. W.	191			2
Hacienda.....Cal.	S. N.	47, 200	1, 3		14, 23, 24, 25, 26, 32
Hacienda.....Cal.	W. P.	47, 200	1, 3		11, 12, 23, 24, 25, 26
Hackberry.....Ariz.	A. T. & S. F.	116			1
Hackett.....Ariz.	S. P.		2, 3	4	7, 8
Hackstaff.....Cal.	W. P.	198 ₁ , 200	1, 3		11, 12, 23, 24, 25, 26
Hadley.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 12
Hado.....Ariz.	S. P.		2, 3		7, 8
Haekel.....Ariz.	A. E.	114			24, 25
Hafed.....Nev.	S. P.	116, 235	2, 3		6
Hageman.....Cal.	S. N.	47, 200	1, 3		14, 23, 24, 25, 26, 32
Haggan.....Cal.	S. N.	47, 200	1, 3		14, 23, 24, 25, 26, 32
Haggan.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 10, 12, 32
Haight.....Cal.	C. C. T.	47, 200	1, 3		12, 23, 24, 25, 26, 32
Haines.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 12, 19
Half Way House.....Cal.	P. E.	47, 200	1, 3		19, 23, 24, 26
Hall.....Cal.	S. P.	47, 200	1, 3		6, 7, 8, 9, 10, 12, 32
Halleck.....Nev.	S. P.	186, 232	2, 3		6
Halleck.....Nev.	W. P.	186, 232	2, 3		11



LIST OF STATIONS IN ARIZONA, CALIFORNIA, MEXICO, NEVADA, NEW MEXICO, OREGON AND UTAH
TO WHICH RATES APPLY—Continued.

STATIONS	RAILROAD LOCATION	CLASS (See pages 112 to 145, inclusive) SCALE No.	COMMODITY RATE BASES (For Explanation of Notes, see page 94)	NOTES (For Explanation, see page 94)	WESTERN GATEWAYS (For Key, see pages 91 and 92)
Halloway	Cal.	S. P.	47, 200	1	6, 7, 8, 9, 10, 12, 32
Halvern	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 10, 12, 32
Hamilton	Cal.	L. A. & S. L.	47, 200	1, 3	4, 12, 23, 24, 25, 26
Hamilton	Cal.	Pen.	47, 200	1	23, 24, 26
Hamilton	Cal.	S. N.	47, 200	1, 3	14, 23, 24, 25, 26, 32
Hamilton	Cal.	S. P.	47, 200	1	6, 7, 8, 9, 10, 12, 32
Hamlet	Cal.	N. W. P.	47, 200	1	12, 15, 23, 24, 25, 26, 27
Hamm	Ariz.	A. E.	22		24, 25
Hammill	Cal.	S. P.		Note 6	6
Hancock	Ariz.	A. T. & S. F.			1
Handorf Spur	Cal.	L. A. & S. L.	47, 200	1, 3	4, 12, 23, 24, 25, 26
Hanford	Cal.	A. T. & S. F.	47, 200	1, 3	1, 23, 24, 25, 26, 32
Hanford	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 12, 32
Hanlon	Cal.	L. A. & S. L.	47, 200	1, 3	4
Hannah	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 10, 12, 32
Hansen	Utah	S. P.	174, 202	2, 3	6
Hansen Jct.	Ariz.	A. E.	196 ¹	2, 3	4
Hapress	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 10, 12, 32
Harbine	Cal.	P. & S. R.	47, 200	1	13, 30, 31, 32, 36
Harbinson	Cal.	S. N.	47, 200	1, 3	14, 23, 24, 25, 26, 32
Harbor City	Cal.	P. E.	47, 200	1, 3	19, 23, 24, 26
Hardy	Ariz.	A. T. & S. F.			1
Hardwick	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 12, 32
Harlem	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 12, 32
Harlem Springs	Cal.	P. E.	47, 200	1, 3	19, 23, 24, 26
Harney	Nev.	S. P.	136, 232	2, 3	6
Harold	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 12, 19
Harp.	Cal.	T. S.	47, 200	1, 3	23, 24, 25, 26, 32
Harper	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 12, 19
Harrelson	Cal.	T. S.	47, 200	1, 3	23, 24, 25, 26, 32
Harriman Lodge	Ore.	S. P.	47	Note 1	1
Harrington	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 10, 12
Harrold	Cal.	A. T. & S. F.	47, 200	1, 3	6, 7, 8, 9, 10, 12, 32
Harte	Cal.	W. P.	47, 200	1, 3	1, 23, 24, 25, 26, 32
Harter	Cal.	S. N.	47, 200	1, 3	11, 12, 23, 24, 25, 26
Hartley	Cal.	S. P.	47, 200	1	14, 23, 24, 25, 26, 32
Hartoun	Cal.	A. T. & S. F.	47, 200	1, 3	6, 7, 8, 9, 10, 12, 32
Hartt	Amiz.	S. P.	196 ¹	2, 3	1
Hartville	Cal.	L. A. & S. L.	47, 200	1, 3	7, 8
Harvard	Cal.	L. A. & S. L.	47, 200	1, 3	4, 12, 23, 24, 25, 26
Harvey and Brown Spur	Cal.	L. A. & S. I.	47, 200	1, 3	4, 12, 23, 24, 25, 26
Haselbush	Cal.	S. N.	47, 200	1, 3	14, 23, 24, 25, 26, 32
Hassayampa	Ariz.	A. E.	43		24, 25, 26
Hasset	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 12, 32
Hasson	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 12, 19
Hatch	Cal.	T. S.	47, 200	1, 3	23, 24, 25, 26, 32
Havel	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 12, 32
Havens	Cal.	O. A. & E.	47, 200	1, 3	12, 23, 24, 25, 26, 34
Haviland	Ariz.	A. T. & S. F.			1
Haviland	Cal.	S. N.	47, 200	1, 3	14, 23, 24, 25, 26, 32
Hawes	Cal.	A. T. & S. F.	47, 200	1, 3	1, 23, 24, 25, 26
Hawkins	N. M.	S. P.			7, 8
Hawley	Cal.	W. P.	52, 254	2, 3	11, 12, 23, 24, 25, 26
Hawthorne	Cal.	P. E.	47, 200	1, 3	19, 23, 24, 26
Hayden	Ariz.	A. E.	35		24, 25, 26
Hayden	Cal.	L. A. & S. L.	47, 200	1, 3	4
Haynes	Cal.	A. T. & S. F.	47, 200	1, 3	1
Haystacks	Cal.	P. & S. R.	47, 200	1	32
Hayward	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 10, 12, 32
Hayward	Cal.	W. P.	47, 200	1, 3	11, 12, 23, 24, 25, 26
Hazelton	Cal.	Sunset	47, 200	1	12, 23, 24, 25, 26, 33, 35
Hazen	Nev.	S. P.	116, 235	2, 3	6
Headquarters	Cal.	O. A. & E.	47, 200	1, 3	12, 23, 24, 25, 26, 34
Headsburg	Cal.	N. W. P.	47, 200	1	12, 15, 23, 24, 25, 26, 27
Hearst	Cal.	S. P.	47, 200	1, 3	6, 7, 8, 9, 10, 12, 32
Heaton	Ariz.	S. P.			7, 8, 9
Heber	Cal.	S. P.	47, 200	1	7, 8, 9
Hebron	Cal.	S. N.	47, 200	1, 3	14, 23, 24, 25, 26, 32
Hector	Cal.	A. T. & S. F.	47, 200	1, 3	1
Heeney	Cal.	T. S.	47, 200	1, 3	32
Heid	Cal.	A. T. & S. F.	47, 200	1, 3	1, 23, 24, 25, 26, 32
Heinlein	Cal.	S. P.	47, 200	1	6, 7, 8, 9, 12, 32

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100	101	102	103	104	105	106	107	108	109	110	111	112	113	114	115	116	117	118	119	120	121	122	123	124	125	126	127	128	129	130	131	132	133	134	135	136	137	138	139	140	141	142	143	144	145	146	147	148	149	150	151	152	153	154	155	156	157	158	159	160	161	162	163	164	165	166	167	168	169	170	171	172	173	174	175	176	177	178	179	180	181	182	183	184	185	186	187	188	189	190	191	192	193	194	195	196	197	198	199	200	201	202	203	204	205	206	207	208	209	210	211	212	213	214	215	216	217	218	219	220	221	222	223	224	225	226	227	228	229	230	231	232	233	234	235	236	237	238	239	240	241	242	243	244	245	246	247	248	249	250	251	252	253	254	255	256	257	258	259	260	261	262	263	264	265	266	267	268	269	270	271	272	273	274	275	276	277	278	279	280	281	282	283	284	285	286	287	288	289	290	291	292	293	294	295	296	297	298	299	300	301	302	303	304	305	306	307	308	309	310	311	312	313	314	315	316	317	318	319	320	321	322	323	324	325	326	327	328	329	330	331	332	333	334	335	336	337	338	339	340	341	342	343	344	345	346	347	348	349	350	351	352	353	354	355	356	357	358	359	360	361	362	363	364	365	366	367	368	369	370	371	372	373	374	375	376	377	378	379	380	381	382	383	384	385	386	387	388	389	390	391	392	393	394	395	396	397	398	399	400	401	402	403	404	405	406	407	408	409	410	411	412	413	414	415	416	417	418	419	420	421	422	423	424	425	426	427	428	429	430	431	432	433	434	435	436	437	438	439	440	441	442	443	444	445	446	447	448	449	450	451	452	453	454	455	456	457	458	459	460	461	462	463	464	465	466	467	468	469	470	471	472	473	474	475	476	477	478	479	480	481	482	483	484	485	486	487	488	489	490	491	492	493	494	495	496	497	498	499	500	501	502	503	504	505	506	507	508	509	510	511	512	513	514	515	516	517	518	519	520	521	522	523	524	525	526	527	528	529	530	531	532	533	534	535	536	537	538	539	540	541	542	543	544	545	546	547	548	549	550	551	552	553	554	555	556	557	558	559	560	561	562	563	564	565	566	567	568	569	570	571	572	573	574	575	576	577	578	579	580	581	582	583	584	585	586	587	588	589	590	591	592	593	594	595	596	597	598	599	600	601	602	603	604	605	606	607	608	609	610	611	612	613	614	615	616	617	618	619	620	621	622	623	624	625	626	627	628	629	630	631	632	633	634	635	636	637	638	639	640	641	642	643	644	645	646	647	648	649	650	651	652	653	654	655	656	657	658	659	660	661	662	663	664	665	666	667	668	669	670	671	672	673	674	675	676	677	678	679	680	681	682	683	684	685	686	687	688	689	690	691	692	693	694	695	696	697	698	699	700	701	702	703	704	705	706	707	708	709	710	711	712	713	714	715	716	717	718	719	720	721	722	723	724	725	726	727	728	729	730	731	732	733	734	735	736	737	738	739	740	741	742	743	744	745	746	747	748	749	750	751	752	753	754	755	756	757	758	759	760	761	762	763	764	765	766	767	768	769	770	771	772	773	774	775	776	777	778	779	780	781	782	783	784	785	786	787	788	789	790	791	792	793	794	795	796	797	798	799	800	801	802	803	804	805	806	807	808	809	8010	8011	8012	8013	8014	8015	8016	8017	8018	8019	8020	8021	8022	8023	8024	8025	8026	8027	8028	8029	8030	8031	8032	8033	8034	8035	8036	8037	8038	8039	8040	8041	8042	8043	8044	8045	8046	8047	8048	8049	8050	8051	8052	8053	8054	8055	8056	8057	8058	8059	8060	8061	8062	8063	8064	8065	8066	8067	8068	8069	8070	8071	8072	8073	8074	8075	8076	8077	8078	8079	8080	8081	8082	8083	8084	8085	8086	8087	8088	8089	8090	8091	8092	8093	8094	8095	8096	8097	8098	8099	80100	80101	80102	80103	80104	80105	80106	80107	80108	80109	80110	80111	80112	80113	80114	80115	80116	80117	80118	80119	80120	80121	80122	80123	80124	80125	80126	80127	80128	80129	80130	80131	80132	80133	80134	80135	80136	80137	80138	80139	80140	80141	80142	80143	80144	80145	80146	80147	80148	80149	80150	80151	80152	80153	80154	80155	80156	80157	80158	80159	80160	80161	80162	80163	80164	80165	80166	80167	80168	80169	80170	80171	80172	80173	80174	80175	80176	80177	80178	80179	80180	80181	80182	80183	80184	80185	80186	80187	80188	80189	80190	80191	80192	80193	80194	80195	80196	80197	80198	80199	80200	80201	80202	80203	80204	80205	80206	80207	80208	80209	80210	80211	80212	80213	80214	80215	80216	80217	80218	80219	80220	80221	80222	80223	80224	80225	80226	80227	80228	80229	80230	80231	80232	80233	80234	80235	80236	80237	80238	80239	80240	80241	80242	80243	80244	80245	80246	80247	80248	80249	80250	80251	80252	80253	80254	80255	80256	80257	80258	80259	80260	80261	80262	80263	80264	80265	80266	80267	80268	80269	80270	80271	80272	80273	80274	80275	80276	80277	80278	80279	80280	80281	80282	80283	80284	80285	80286	80287	80288	80289	80290	80291	80292	80293	80294	80295	80296	80297	80298	80299	80300	80301	80302	80303	80304	80305	80306	80307	80308	80309	80310	80311	80312	80313	80314	80315	80316	80317	80318	80319	80320	80321	80322	80323	80324	80325	80326	80327	80328	80329	80330	80331	80332	80333	80334	80335	80336	80337	80338	80339	80340	80341	80342	80343	80344	80345	80346	80347	80348	80349	80350	80351	80352	80353	80354	80355	80356	80357	80358	80359	80360	80361	80362	80363	80364	80365	80366	80367	80368	80369	80370	80371	80372	80373	80374	80375	80376	80377	80378	80379	80380	80381	80382	80383	80384	80385	80386	80387	80388	80389	80390	80391	80392	80393	80394	80395	80396	80397	80398	80399	80400	80401	80402	80403	80404	80405	80406	80407	80408	80409	80410	80411	80412	80413	80414	80415	80416	80417	80418	80419	80420	80421	80422	80423	80424	80425	80426	80427	80428	80429	80430	80431	80432	80433	80434	80435	80436	80437	80438	80439	80440	80441	80442	80443	80444	80445	80446	80447	80448	80449	80450	80451	80452	80453	80454	80455	80456	80457	80458	80459	80460	80461	80462	80463	80464	80465	80466	80467	80468	80469	80470	80471	80472	80473	80474	80475	80476	80477	80478	80479	80480	80481	80482	80483	80484	80485	80486	80487	80488	80489	80490	80491	80492	80493	80494	80495	80496	80497	80498	80499	80500	80501	80502	80503	80504	80505	80506	80507	80508	80509	80510	80511	80512	80513	80514	80515	80516	80517	80518	80519	80520	80521	80522	80523	80524	80525	80526	80527	80528	80529	80530	80531	80532	80533	80534	80535	80536	80537	80538	80539	80540	80541	80542	80543	80544	80545	80546	80547	80548	80549	80550	80551	80552	80553	80554	80555	80556	80557	80558	80559	80560	80561	80562	80563	80564	80565	80566	80567	80568	80569	80570	80571	80572	80573	80574	80575	80576	80577	80578	80579	80580	80581	80582	80583	80584	80585	80586	80587	80588	80589	80590	80591	80592	80593	80594	80595	80596	80597	80598	80599	80600	80601	80602	80603	80604	80605	80606	80607	80608	80609	80610	80611	80612	80613	80614	80615	80616	80617

ITEM
No.

APPLICATION OF RATES.

INTERMEDIATE APPLICATION OF RATES.

Except as may be otherwise specifically provided in tariff, rates provided will be subject to intermediate application FROM points of origin as per Note 1, and TO points of destination as per Note 2 below.

NOTE 1.—Except as otherwise provided in Notes 5 and 7, when rates are not specifically provided for FROM stations located directly intermediate to and on the same line or route with stations from which rates are specifically provided, apply the rate which is specifically provided FROM the next more distant point on that line or route.

NOTE 2.—When rates are not specifically provided for TO stations located directly intermediate to and on the same line or route with stations to which rates are specifically provided, apply the rate which is specifically provided TO the next more distant point on that line or route. (See Notes 4 and 6.)

(This application will not apply at points north of and including Gregory, Ore., nor in connection with class rates to points on the Western Pacific R. R. north of Reno, Nev., to and including Reno Jct., Cal.)

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NOTE 3.—Stations not named in individual rate items will take the rate applicable to the next more distant station (as above provided) notwithstanding that such stations may be named in other commodity or class rate items. (See Note 6.)

NOTE 4.—Points on the Southern Pacific R. R., between Tucson and Nogales, Ariz., will be considered as intermediate points under the application in Notes 2 and 3.

NOTE 5.—Rates authorized in Note 1 will not apply from points on the Great Northern R'y west of Brook Park, Minn., west of Minneapolis, Minn., nor north of Merrill, Iowa.

NOTE 6.—(a) Intermediate application authorized in Notes 2 and 3 will not apply to points on Southern Pacific R. R. north of Mojave, Cal., to but not including Owenyo, Cal.

(b) Unless specifically provided rates herein will not apply via the Nevada-California Branch of the Southern Pacific R. R., to Owenyo, Cal., North of Mojave, that is, Branch extending northeast from Mojave, Cal.

NOTE 7.—Rates named in tariff from points in Canada are issued to meet competition and will not apply from any point in Canada intermediate thereto. (Published in compliance with General Order 177 issued by Board of Railway Commissioners for Canada.)

★Issued under authority of Interstate Commerce Commission Fourth Section Order No. 7046 of November 20, 1917.

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ALTERNATIVE APPLICATION OF COMBINATION RATES.

▲(a) (See Note C on title page hereof.) This tariff (supplements thereto and reissues thereof), having been issued in compliance with Commission's amended Fourth Section Order No. 6790 of date June 30, 1917, and the carriers having been unable, owing to the wide scope of territory covered, to publish the combinations of rates which make less than the through rates provided in the tariff (or as amended), the Commission has authorized the following alternative rate provisions (b).

▲(b) (See Note C on title page hereof.) If the aggregate of intermediate rates via the route over which the shipment moves, wherever found, makes less than the joint through rates contained in this tariff (and as amended), such aggregate of rates will be applied.

▲Issued under authority of Interstate Commerce Commission Order of October 17, 1918.

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If Rate Basis 1 or Rate Basis 3 rates or aggregate of rates to points taking those bases added to

the arbitraries authorized in Trans-Continental Freight Bureau Arbitrary Circular No. 59-B (I. C. C. Nos. 32, 684 and 1050 of C. C. McCain, Agent, Eugene Morris, Agent, and R. H. Countiss, Agent, respectively), and as amended,

or

If the rates applying to points in Arizona, California, Nevada, New Mexico or Utah, shown on pages 34 to 90, inclusive, as taking "Rate Basis 1," "Rate Basis 2" or "Rate Basis 3" rates added to

the arbitraries shown in Section 1 of Trans-Continental Freight Bureau Arbitrary Circular No. 61-A (I. C. C. Nos. 23, 619 and 1023 of C. C. McCain, Agent, Eugene Morris, Agent, and R. H. Countiss, Agent, respectively);

or

If the rates published in tariffs lawfully on file with the Interstate Commerce Commission, from points in Groups "A" to "J", inclusive, as described on pages 1 to 28, inclusive, to Ogden, Salt Lake City, Utah, Albuquerque, Belen, Deming, N. M., or El Paso, Texas, added to

the arbitraries shown in Section 2 of Trans-Continental Freight Bureau Arbitrary Circular No. 61-A (I. C. C. Nos. 23, 619 and 1023 of C. C. McCain, Agent, Eugene Morris, Agent, and R. H. Countiss, Agent, respectively), from Ogden, Salt Lake City, Utah, Albuquerque, Belen, Deming, N. M., or El Paso, Texas, to destination.

make less than the through rates provided in tariff, the combination rates so made will apply.

EXCEPTION 1.—If a rate in tariff (and as amended) is specifically restricted to apply via certain routes only, the same restrictions shall apply when such rate is used as a factor under the provisions of this item.

EXCEPTION 2.—If any rate used as a factor under the provisions of this item applies only via rail-and-water routes, combination rate made by use of such factor shall likewise apply only via the same rail-and-water route.

already come into effect

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ITEM
No.

APPLICATION OF RATES—Continued.

RULES FOR CONSTRUCTING COMBINATION RATES FROM AND TO POINTS WHERE NO THROUGH RATES ARE PUBLISHED.

Except as otherwise indicated, rates on carload shipments named below, from and to points where no through rates are published in this tariff, are subject to rules for constructing combination rates as provided in Agent Eugene Morris' Freight Tariff No. 228, I. C. C. No. U. S. 1, supplements thereto or reissues thereof:

	COMMODITY	As described in items designated below	COMMODITY	As described in items designated below
10	Brick and Articles taking Brick Rates.....	800, 810, 4092, 4094, 4096, 4560, 4566, 4568, 4570	Lumber and Forest Products.....	2315, 2320, 2330, 2335, 4386, 4388
	Cement and Plasters.....	690, 2775, 4056, 4058, 4446, 4552	Ore, Iron.....	2560
	Cotton.....	940, 945	Sand.....	3115, 3130
	Cotton Linters.....	940, 945	Stone, artificial and natural, building and monumental	3265, 3270
	Lime.....	2265	Stone, crushed.....	3115
	Live Stock.....	4702 to 4718, incl.		

CLASS ARBITRARY.

The "Class Arbitrary" shown in rate items in Section 2 of this tariff, designates the class to be used in applying the Class Arbitraries named in Trans-Continental Freight Bureau Arbitrary Circular No. 59-B (I. C. C. Nos. 32, 684 and 1050 of C. C. McCain, Agent, Eugene Morris, Agent, and R. H. Countiss, Agent, respectively), and Trans-Continental Freight Bureau Arbitrary Circular No. 61-A (I. C. C. Nos. 23, 619 and 1028 of C. C. McCain, Agent, Eugene Morris, Agent, and R. H. Countiss, Agent, respectively), only on carload shipments of two or more articles for which no mixed carload arbitrary is provided in said Circulars Nos. 59-B and 61-A for use in connection with "Rate Basis 3" rates, as shown in Section 2 of this tariff.

APPLICATION OF RATES VIA MALLORY STEAMSHIP CO., SOUTHERN PACIFIC STEAMSHIP LINE AND SOUTHERN STEAMSHIP CO.

Except as otherwise provided, class and commodity rates in this tariff will apply via Mallory Steamship Co., Southern Pacific Steamship Line and Southern Steamship Co., only as specifically provided below. (See Note 1.)

NOTE 1.—(a) In connection with the Mallory Steamship Co. rates will not apply via the Southern Pacific R. R. and El Paso, Tex.

(b) In connection with the Southern Pacific Steamship Line, rates will not apply via the Atchison, Topeka & Santa Fe R'y and Albuquerque or Belen, N. M., except to points located on the Atchison, Topeka & Santa Fe R'y, Los Angeles & Salt Lake R. R., Western Pacific R. R. and Oakland, Antioch & Eastern R'y.

	FROM	TO	GATEWAYS
13	New York Pier of Mallory Steamship Co.	Points shown on pages 34 to 90, inclusive (See Exception below)	1, ①2, 7, 12, 13, 14, 15, ①6, ①7, 24, 31
	New York Pier of Southern Pacific Steamship Line.	EXCEPTION.—Rates will not apply to points located on the Southern Pacific R. R. east of Colfax, Cal., and north of Seales, Cal., and on Western Pacific R. R. east of California-Nevada State Line.	①Will not apply via Deming, N. M.
	Philadelphia Pier of Southern Steamship Co.		

APPLICATION OF RATES ON IMPORT TRAFFIC.

RATES ON IMPORT TRAFFIC ORIGINATING IN EUROPE (OR BEYOND)—SEE RULES GOVERNING APPLICATION, ITEM 27.

The rates named in this tariff from points taking Group A rates, will apply from Atlantic ports of entry (i. e., Baltimore, Md., Boston, Mass., Newport News, Va., Philadelphia, Pa., Portland, Me., Montreal, Que., St. John, West St. John, N. B., Halifax, N. S., and New York, N. Y.), on shipments originating in Europe (or beyond), destined to points taking "Rate Basis 1," "Rate Basis 2" or "Rate Basis 3" rates (or beyond).

RATES ON IMPORT TRAFFIC ORIGINATING IN FOREIGN COUNTRIES—SEE RULES GOVERNING APPLICATION, ITEM 27.

On traffic originating in foreign countries and destined to points covered by this tariff (or beyond), the rates named herein as applying from Galveston, Tex., will apply also from shipside at Galveston, Port Arthur, Port Bolivar, Texas City, Tex., Algiers, Gretna, New Orleans and Westwego, La.



SECTION 2—COMMODITY RATES—Continued.

(TARIFF 1-R)

Item No.	ARTICLES	Min. C. L. wt. (Pounds)	RATES IN CENTS PER 100 POUNDS (Except as noted)					
			FROM Points shown on pages 1 to 29, inclusive, as taking the following Group Rates	TO Points shown on pages 34 to 90, inclusive, as taking			Rate Basis 1 Rate Basis 2 Rate Basis 3	
				L.C.L.	C. L.	L.C.L.	C. L.	L.C.L.
	OILS, viz.—Concluded:							
2545	Oil, peanut, N. O. S., In cans boxed, or in bulk in barrels, In tank cars, actual weight per gallon at point of loading.	30,000	In pack- ages named 30,000	A B C D	156 144 137 131	156 144 137 131	125 112 112 112	125 112 112 112
	NOTE 1.—Subject to refining-in-transit privileges as published in tariffs of individual lines, parties hereto, lawfully on file with the Interstate Commerce Com- mission.	In tank cars, see Rule 6	E F G H J					
2550	Oil, petroleum and its products, classified fifth class under heading of "Petroleum or Petroleum Prod- ucts, including compounded Oils or Greases having a Petroleum Base" (exclusive of Sewing Machine and Cycle Oils), in current Western Classification, sub- ject to rules, weights per gallon and minimum weights thereof. (See Note).	As per current Western Classifi- cation	A B C D E F G H J					\$129 119 114 109
	NOTE.—Rates named will apply also on Lubricating Compounds having a petroleum base and mixed with hair, waste or yarn.							104 94 94 94 94
	§The Southern Pacific Steamship Line, Mallory Steam- ship Co., Old Dominion Steamship and Southern Steamship Co., will not accept shipments of Paraffine Wax, in bulk, Benzine, Gasoline, Naphtha and Kero- sene Oil, in barrels.							
2555	Oil, petroleum road, In barrels, In tank cars, actual weight per gallon. +Class rates will not apply. No through rates in effect.	60,000	In barrels 60,000	A B C D	+	+	+	+
			In tank cars, see Rule 6	E F G H J	64 59 59 59 59	64 59 59 59 59	64 59 59 59 59	
2560	Ore, iron, ground or unground. +Class rates will not apply. No through rates in effect.	60,000		A B C D	+	+	+	+
				E F G H J	66 61 61 61 61	66 61 61 61 61	66 61 61 61 61	
2565	Oysters, shell, in bags, prepaid or guaranteed.	30,000		A B C D	219 219 219 219	219 219 219 219	219 219 219 219	219 219 219 219



NO SUPPLEMENT TO THIS TARIFF WILL BE ISSUED
EXCEPT FOR THE PURPOSE OF CANCELLING THE
TARIFF.
ADDITIONS TO, CHANGES IN AND ELIMINATIONS FROM
THIS TARIFF WILL BE PUBLISHED IN LOOSE LEAF
FORM.

I. C. C. No. 4067
Cancels I. C. C. No. 3848

UNITED STATES RAILROAD ADMINISTRATION

DIRECTOR GENERAL OF RAILROADS.

SOUTHERN PACIFIC RAILROAD

ASHLAND, ORE., AND LINES SOUTH THEREOF.

Local and Proportional Freight Tariff No. 711-A

(Cancels Local and Proportional Freight Tariff No. 711)

NAMING CLASS RATES

BETWEEN	AND
SAN FRANCISCO	CAL.
OAKLAND	"
SAN JOS ^E	"
CROCKE ^R	"
PORT CO.	"
ANTIOCH	"
STOCKTON	"
SACRAMENTO	"
MARYSVIL ^E	"
BENICIA	"
SOUTH VAL EJO	"
LOS ANGELS	"
and other points in California.	

POINTS IN CALIFORNIA.

AS SHOWN HEREIN.

PROPORTIONAL CLASS RATES

BETWEEN	AND
BIGGS	CAL.
PEART	CAL.
	HOWARD

POINTS IN CALIFORNIA
RICHVALE, WYO., HAMILTON, DORRIS, COLE
and Points Between

Governed, except as otherwise provided herein, by Current Western Classification, and by Current Exceptions to said Classification.
(See Note.)

The terms "Current Western Classification" and "Current Exceptions thereto," wherever they appear in Tariff, refer to The Western Classification No. 55 (I. C. C. No. 13 of R. C. Fife, Agent), and Pacific Freight Tariff Bureau Exception Sheet No. 1-F (I. C. C. No. 305 of F. W. Gomph, Agent), supplements thereto or reissues thereof.

NOTE: Exceptions to the Current Western Classification on Petroleum Crude Oil and Petroleum Gas Oil, straight carloads, also Petroleum Refineries, viz.: Refinery Residuum, straight carloads, and Engine (Naphtha) Distillate, carloads, shown in Items 400-A and 405-B o. in the Freight Tariff Bureau Exception Sheet No. 1-F, I. C. C. No. 305 of F. W. Gomph, Agent, will not apply in connection with rates fixed herein. Current Western Classification and Rule 40 herein will apply.

Changes which result from additions of or abandonment of stations and station facilities contained in this tariff are filed under authority of the Interstate Commerce Commission's Fifteenth Section Order No. 250 of January 8, 1918, without formal hearing, which approval shall not affect any subsequent proceeding relative thereto.

Published for the Director General of Railroads under authority of Section 2 of Circular No. 1-B of the Director, Division of Traffic, United States Railroad Administration, dated February 1, 1919.

INTRASTATE TRAFFIC.—This Tariff contains rates that are lower for longer distances than for shorter distances over the same line or route in the same direction, such departure from the terms of the Constitution and Section 24(a) of the Public Utilities Act is permitted, except as shown in individual items, by order of the Railroad Commission of the State of California in Decision No. 3436, dated June 19, 1916, in Case No. 214-A.

ISSUED SEPTEMBER 30, 1919.

EFFECTIVE NOVEMBER 20, 1919.

Issued by
G. W. LUCE,
Freight Traffic Manager,
San Francisco, Cal.

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INDEX OF POINTS FROM AND TO WHICH RATES APPLY—Continued.
SIDE LINE POINTS

POINTS	INDEX NO.	POINTS	INDEX NO.	POINTS	INDEX NO.
Draper	Cal. 1730	Emigrant Gap	Cal. 1270	Frink	Cal. 5810
Drawbridge	185	Encino	4970	Fruitvale	" 45
Dredge	1585	Ensign	1675	Fruto	" 2880
Dreyfus	5225	Enwood	1140	Fulda	" 1265
Dry Camp	5745	Eocene	6940	Fulton Wells	" 5105
Drylyn	5955	Erickson	2030	Gabilan	" 6805
Duarte	5375	Eshel	3795	Gadwall	" 3170
Ducor	4040	Esmar	3510	Galindo	" 530
Dufour	2770	Esparto	2575	Galt	" 810
Dugan	1055	Espinosa	6860	Garfield Avenue	" 5390
Dulah	7320	Estelle	5830	Garic	" 2665
Dumbarton	125	Ester	2045	Garlock	" 4570
Dunnigan	2790	Estudillo	205	Garnsey	" 4955
Dunsmuir	1905	Etiwa	5555	Garus	" 7115
Durham	1565	Euclid Avenue	5530	Gaspar	" 5060
Durmid	5795	Eva	6315	Gato	" 7170
Durney	6505	Evans	1980	Gaviota	" 190
Dutch Flat	1225	Ewing	1435	Gazelle	" 2105
Dyer	5240	Exeter	3920	Geagan	" 1985
Eaglet	" 6980	Fagan	1535	Genevra	" 2810
Earlimart	4190	Fairmead	3595	Gerber	" 1695
East Alhambra	5330	Fair Oaks	990	Getty	" 6905
Eastnerne	5640	Famoso	4220	Giant	" 425
East Oakland	35	Farad	1400	Giant Oak	" 4145
East Weed	1975	Fargo	3835	Gibson	" 1845
Eblis	6420	Farmersville	4140	Gigling	" 6710
Eckley	485	Farmington	3005	Gilroy	" 6525
Edenvale	6475	Farwell	275	Gimbal	" 1640
Eder	1325	Faulkner	1570	Girvan	" 1750
Edfu	7390	Felton	6370	Glamis	" 5945
Edgewood	2100	Fep	6540	Glann	" 930
Edison	4415	Fergus	3550	Glen Arbor	" 6375
Edna	7010	Fillmore	7560	Gendale	" 4995
Edom	5740	Fingal	5705	Glen Ellen	" 2445
Edwin	835	Firebaugh	3200	Glenwood	" 6335
Efco	3845	Fisher	1850	Glorietta	" 3745
Eggers	3720	Fitchburg	70	Gloster	" 4815
Elayon	4890	Fleming	385	Gola	" 4360
El Casco	5675	Fleta	4810	Gold Run	" 1220
El Centro	5900	Flint	1170	Goldtree	" 7000
El Dorado	1085	Flonellia	1035	Goler	" 4575
Eldridge	2440	Florence	5020	Goleta	" 7245
Elftman	5040	Florin	880	Gonzales	" 6815
Eliot	310	Floriston	1395	Goodyear	" 2180
Elk Grove	870	Flosden	2245	Gordola	" 6440
Elkhorn	6677	Flowerfield	680	Gordon	" 3755
Ellicott	6615	Flowing Well	5915	Gorge	" 1240
Elmhurst	75	Floyd	3300	Gosford	" 4335
Elmira	2520	Flume	1865	Goshen Junction	" 4115
El Modena	5210	Folsom	1015	Gotri	" 3010
El Monte	5425	Folsom Junction	1010	Grand Terrace	" 5505
Elmore	1815	Fondo	5845	Granger	" 490
Elna	4750	Forebay	1250	Granz	" 3700
El Pinal	725	Forest Home	590	Grape	" 5890
El Prado	3760	Forest Lake	805	Grapit	" 2895
El Rio	7400	Forsey	3225	Grass Lake	" 2020
Elsa	6870	Fowler	4080	Gratto	" 5190
Elvas	1105	Fram	4510	Gravel	" 3765
Elvaton	2760	Franklyn	750	Graves	" 6775
El Verano	2420	Freeport	915	Greenwood	" 2900
Elwood	7230	French Camp	705	Grenada	" 2110
Emanuel	6055	Fresno	3690	Greystone	" 6470
Emeryville	345	Friant	3770	Gridley	" 1540

Issued by
G. W. LUCE,
Freight Traffic Manager,
San Francisco, Cal.

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INDEX OF POINTS FROM AND TO WHICH RATES APPLY—Continued.
SIDE LINE POINTS

POINTS	INDEX NO.	POINTS	INDEX NO.	POINTS	INDEX NO.
Grover.	Cal. 7030	Hovant.	Cal. 4075	Kingsburg.	Cal. 4100
Guadalupe.	" 7050	Hovden.	" 6755	Kirkwood.	" 2925
Guasti.	" 5545	Hovely.	" 5870	Klamathon.	" 2135
Guinda.	" 2805	Howard.	" 2675	Klink.	" 3890
Gunter.	" 1260	Howest.	" 6125	Knights Landing.	" 2695
Gustine.	" 3135	Howton.	" 4000	Knob.	" 5970
Gypsum.	" 4550	Hoyt.	" 2185	Knowles.	" 3635
Hadley.	" 7015	Hub.	" 3265	Knowles Junction.	" 3625
Haggins.	" 1115	Hudner.	" 6545	Kohler.	" 65
Haines.	" 7520	Hugo.	" 5720	Krug.	" 2345
Maiwee.	" 4670	Humphreys.	" 4870	Kurand.	" 2865
Tall.	" 110	Hunt.	" 4215	Kurth.	" 3965
Halloway.	" 775	Huntington Beach.	" 5275	La Bolsa.	" 5290
Halvern.	" 225	Huron.	" 3425	Labranza.	" 3570
Hamilton.	" 2915	Hutchinson.	" 60	Lacjac.	" 3850
Hammill.	" 4800	Iceland.	" 1385	La Cross.	" 7350
Hanford.	" 3460	Igerna.	" 1965	Lagol.	" 7445
Hannah.	" 6050	Imola.	" 2270	Laguna.	" 6005
Hapress.	" 525	Imperial.	" 5895	Lake Majella.	" 6765
Hardwick.	" 3365	Indio.	" 5755	Lake View.	" 1820
Harlem.	" 6850	Ingle.	" 3215	Lake Vineyard.	" 5335
Harold.	" 4835	Ingleside.	" 6025	Lakmer.	" 6030
Harper.	" 5260	Ingomar.	" 3145	Lamoine.	" 1840
Harrington.	" 2800	Inyokern.	" 4610	Lancaster.	" 4825
Hartley.	" 2540	Ione.	" 850	Lander.	" 1200
Hasset.	" 3275	Iris.	" 5920	Lang.	" 4865
Hasson.	" 7480	Irma.	" 7250	Lankershim.	" 4950
Havel.	" 6975	Irondale.	" 440	Lanson.	" 4660
Hayward.	" 220	Irrigosa.	" 3665	Lapaco.	" 4945
Hearst.	" 1495	Irvington.	" 245	Le Patera.	" 7240
Heber.	" 5905	Irwindale.	" 5450	Lapis.	" 6695
Heinlen.	" 3390	Ivesta.	" 3810	Larkmead.	" 2360
Helium.	" 780	IVrea.	" 1720	Le Rose.	" 4500
Heim.	" 3240	Jacksnipe.	" 2205	La Salle.	" 7.20
Henderson.	" 140	Jacobs.	" 4120	Las Juntas.	" 350
Henry.	" 6060	Jalamo.	" 7155	Las Palmas.	" 3715
Herbert.	" 3820	Jamesan.	" 3280	Lateen.	" 5455
Hercules.	" 450	Janney.	" 675	Lathrop.	" 700
Herdlyn.	" 665	Jarn.	" 730	Latrobe.	" 1030
Herndon.	" 3675	Jasmin.	" 4055	Laugenour.	" 2680
Hershey.	" 2795	Jerome.	" 2070	Laurel.	" 6330
Hewitt.	" 7505	Jesbel.	" 3615	La Verne.	" 5499
Hickman.	" 3045	Jester.	" 1445	Lawndale.	" 2470
Highgrove.	" 5600	Katsura.	" 5880	Lawrence.	" 6230
Hillside.	" 3630	Kearney.	" 3310	Laws.	" 4780
Hilt.	" 2150	Kearsarge.	" 4740	Lee.	" 2715
Hinds.	" 5680	Keeler.	" 4730	Leesdale.	" 7425
Hislop.	" 710	Kegg.	" 2065	Le Franc.	" 6270
Hoey.	" 1990	Keith.	" 7545	Leliter.	" 4615
Hoffman Avenue.	" 6750	Kellum.	" 2060	Lemon.	" 7385
Höiden.	" 2985	Kemp.	" 7590	Lemoore.	" 3385
Hollister.	" 6550	Kennet.	" 1800	Leono.	" 7410
Holly.	" 985	Kenwood.	" 2465	Leonard.	" 6625
Holy Cross.	" 6070	Kerman.	" 3290	Lerdo.	" 4235
Homestead.	" 895	Kern Junction.	" 4400	Le Roy.	" 3450
Hony.	" 4875	Keater.	" 4960	Lealie.	" 6135
Honet.	" 1490	Keswick.	" 1775	Lethent.	" 3415
Honda.	" 7135	Kevet.	" 7540	Lick.	" 6455
Hood.	" 925	Keyea.	" 3515	Lignite.	" 830
Hooker.	" 1725	Kimble.	" 3370	Lillis.	" 3360
Hookston.	" 545	King City.	" 6875	Limco.	" 7515
Hope Ranch.	" 7255			Limestone.	" 1065
Hornbrook.	" 2140			Lincoln.	" 1425

Issued by
G. W. LUCE,
Freight Traffic Manager,
San Francisco, Cal.



INDEX OF POINTS FROM AND TO WHICH RATES APPLY—Continued.
SIDE LINE POINTS

POINTS	INDEX NO.	POINTS	INDEX NO.	POINTS	INDEX NO.
Nevada Dock.....Cal.	500	Orland.....Cal.	2905	Post.....Cal.	7110
Nevills....."	3315	Oroville....."	1510	Potholes....."	6010
New Almaden....."	6290	Orris....."	4045	Prattion....."	3320
Newark....."	120	Ortega....."	7285	Prince....."	630
Newcastle....."	1160	Ortonville....."	7335	Proberta....."	1700
New England Mills....."	1195	Osage....."	580	Prosser Creek....."	1370
Newell Junction....."	6380	Ostrom....."	1455	Puente....."	5495
Newell Creek Mill....."	6385	Owald....."	2745	Puente Oil Siding....."	5500
New Delhi....."	5245	Owensmouth....."	4980	Pumork....."	6155
Newhall....."	4885	Owenyo....."	4715	Punta....."	7310
Newland....."	5280	Owl....."	5695	Quail....."	4180
Newlove....."	640	Oxalis....."	3190	Rack....."	6820
Newman....."	3130	Oxley....."	555	Rademacher....."	4595
Newport Beach....."	5270	Oxnard....."	7405	Radnor....."	4200
Nichols....."	610	Pabrico....."	135	Radum....."	300
Niland....."	5825	Pacific Grove....."	6760	Raisin City....."	3345
Niles....."	240	Pacmanco....."	6240	Ramal....."	2395
Nimbus....."	995	Pacoima....."	4920	Ramirez....."	1480
Nitro....."	435	Pacsteel....."	40	Ramona....."	945
Nobel....."	390	Page....."	4225	Rand....."	4580
Nome....."	4305	Palermo....."	1500	Ratio....."	2260
Nord....."	1645	Palmdale....."	4830	Ravenna....."	4550
Nordhoff....."	7370	Palm Springs....."	5725	Ravenswood....."	130
Norman....."	2840	Palo Alto....."	6185	Rawson....."	1705
North Alhambra....."	5325	Parada....."	5360	Raymer....."	7500
North San Gabriel....."	5345	Paradise....."	1600	Raymond....."	3640
Norton....."	2560	Paraffin....."	360	Raymond Hotel....."	5395
Norwalk....."	5120	Pasadena....."	5400	Ready....."	6635
Nuga....."	6610	Paso Robles....."	6945	Rector....."	4135
Nutglade....."	1900	Patterson....."	3110	Red Bluff....."	1710
Nutwood....."	5160	Paul....."	2015	Redding....."	1765
Oakdale....."	3030	Paularino....."	5250	Redlands....."	5635
Oakdale Farms....."	1595	Pearl....."	2670	Redlands Junction....."	5625
Oak Knoll....."	2300	Penoyer....."	2040	Redwood City....."	6165
Oakland....."	15	Penry...."	1155	Redwood Junction....."	155
Oakland Wharf....."	10	Perkins....."	950	Reedley....."	3360
Oak View....."	7355	Perry....."	6485	Reksa....."	3825
Oakville....."	2315	Feshine....."	7070	Remillard....."	305
Oceano....."	7035	Peters....."	2990	Remnroy....."	3465
Ocean View....."	6015	Peyton....."	515	Remount....."	135
Octol....."	4170	Pierce....."	2190	Reseda....."	4975
Ogilby....."	5965	Pineland....."	2010	Retreat....."	6725
Ohm....."	3090	Pinole....."	445	Riceton....."	1550
Oil City....."	4285	Pioneer....."	1940	Richfield....."	2935
Oil Junction....."	4245	Piru....."	7580	Richgrove....."	4050
Oiancha....."	4680	Pitt....."	1805	Richmond....."	415
Oleson....."	2485	Pittsburg....."	620	Richvale....."	1555
Oleum....."	460	Pixley....."	4185	Rimlon....."	5725
Olig....."	4395	Pizmo....."	7025	Rincon....."	6415
Oliva....."	7260	Placeriville....."	1100	Rio Bravo....."	4355
Olympia....."	6360	Plantel....."	6535	Ripon....."	3485
Ontario....."	5540	Pleasanton....."	295	Rivas....."	5380
Opal....."	6655	Polaris....."	1360	Riverdale....."	3255
Oporto....."	4060	Polita....."	4775	Riverside....."	5615
Optimo....."	1610	Polk....."	885	Riverside Junction....."	5610
Ora....."	3435	Pollock....."	1820	Rivertdale....."	2850
Orange Center....."	5605	Pomona....."	5520	Riz....."	85
Orby....."	6430	Ponca....."	4025	Robert....."	3260
Ord....."	6745	Pope....."	5805	Robinson....."	3900
Ordway....."	5670	Poppy....."	5840	Roche....."	1145
Orella....."	7205	Porque....."	4200	Rocklin....."	5860
Orford....."	2965	Port Costa....."	495	Rockwood....."	455
Orion....."	3380	Porterville....."	3970	Rodeo....."	

Rule No.	RULES AND REGULATIONS.
5	<p>INTERSTATE AND INTRASTATE TRAFFIC.</p> <p>(a) Unless otherwise specifically provided, rates from points from which a specific rate is not named will be the same as the rate from the next more distant point on same direct line from which a specific rate is named.</p> <p>(b) Unless otherwise specifically provided, rates to points to which a specific rate is not named will be the same as the rate to the next more distant point on same direct line to which a specific rate is named.</p> <p>INTERSTATE TRAFFIC (ONLY).</p> <p>(c) Whenever a carload (or a less-than-carload) commodity rate is established, it removes the application of the Class Rates to or from the same points on that commodity in carload quantities (or less-than-carload quantities, as the case may be).</p> <p>INTRASTATE TRAFFIC (ONLY).</p> <p>(d) Whenever a Class Rate and a Commodity Rate are named between specified points, the lower of such rates is the lawful rate, unless some combination of Class Rates, or of Commodity Rates, or of Class and Commodity Rates, makes a lower through rate (see exception below).</p> <p>EXCEPTION—Intrastate Traffic:—Rates named herein must not be applied on livestock in combination with specific commodity rates for the purpose of defeating through specific commodity rates as published in Local, Joint and Proportional Freight Tariff 645-B (I. C. C. 4045) or reissues thereof.</p>
10	Application of Rates: All rates herein applying from or to Muscatel, Cal., will also apply from or to Biola Junction, Biola Junction, Cal.: Cal., unless lower rates are otherwise specifically provided.
15	Application of Rates: Rates from or to points not named, which may be located between two points in Groups 1, 2 or 3, Points in Groups Not Named: will take the rate from or to the next more distant point on same direct line.
20	<p>Bills of Lading: It is unlawful to misdate or otherwise make false entries on Bills of Lading, hence Bills of Lading must not be issued purporting to show that the freight covered thereby originated at points other than those from which it is actually shipped or be dated other than as of the day upon which the shipping instructions are fully given and the carrier finally authorized to forward the property.</p> <p>Formal Bills of Lading may be exchanged for Switching Tickets and when the latter show consignee and destination and are, in effect, informal Bills of Lading issued by initial carriers, the formal Bill of Lading may be executed bearing the date shown on Shipping Ticket but not otherwise.</p>
25	<p>Explosives—Estimated Weights: Shipments of Fuse, Powder and High Explosives will be charged for on basis of estimated weights as provided in Pacific Freight Tariff Bureau Circular No. 1-C (I. C. C. No. 340) of F. W. Gomph, Agent, supplements thereto or reissues thereof.</p>
30	<p>Instructions for Handling Loose Leaf Tariff: This Tariff is issued in loose leaf form and all changes will be made by reprinting the entire page. Such reprinted pages will bear same page number as the original page and also show in upper left hand corner that it is a revised page and what page it cancels; for example—"1st revised page 15 cancels original page 15" or "2nd revised page 15 cancels 1st revised page 15," etc.</p> <p>New pages added to the tariff will be numbered with a letter affix, such as 15-A. Reissue of these new pages will likewise bear the same page number, e. g. 15-A, and similar notation in upper left hand corner as to the revised page.</p> <p>Reprinted pages cancel only pages bearing same page number and in no case would page 15-A cancel page 15, nor page 15-B cancel page 15-A.</p>
35	Live Stock—Transportation of: Live Stock will be transported on Lines of Southern Pacific Railroad in accordance with provisions of Rules and Regulations governing transportation of Live Stock, Circular G. F. D. 188-E (I. C. C. No. 3454), or reissues thereof.
40	<p>Minimum Carload Weight Petroleum Crude Oil, etc., and Distillate:</p> <ul style="list-style-type: none"> (a) Petroleum Crude Oil and Petroleum Gas Oil, straight carloads, also Petroleum Fuel Oil, viz.: Refinery Residuum, straight carloads. (b) Engine (Naphtha), Distillate, carloads. <p>Minimum carload weight in packages 30,000 lbs.</p> <p>Minimum carload weight in tank cars subject to Rule 32 of Current Western Classification.</p>

Issued by
G. W. LUCE,
Freight Traffic Manager,
San Francisco, Cal.



RULES AND REGULATIONS—Continued.

Rule No.	
55	Station Changes and Requirements: - Prepay requirements at stations, changes in station names, establishment and abandonment of stations and sidings, handling of carload and less than carload freight at stations and sidings and geographical and alphabetical list of stations are governed by Southern Pacific Railroad's G. F. D. Circular No. 263-C (I. C. C. No. 3793), supplements thereto or reissues thereof.
60	Stopping to Load or Unload in Transit: Carload rates apply only to full carload shipments from one consignor at initial point of shipment, consigned and to be delivered to one consignee at one destination. Unless otherwise specifically provided immediately in connection with individual rate items, carload shipments cannot be stopped in transit to partly unload or to complete loading at the rates named in Tariff. All carload shipments so stopped will be subject to the rate to and from the point at which the stop is made.
65	Terminal and Other Charges: Except as otherwise specifically provided shipments made at rates named in this tariff are subject to the Terminal and other Charges, Privileges and Allowances provided in Southern Pacific Railroad's Terminal Tariff No. 230-G (I. C. C. No. 3467), or reissues thereof.
70	Basis for Making Rates on Petroleum and Petroleum Products, Carloads: (See Note on Title Page, also Rule 40.) Except where lower commodity rates on Petroleum and Petroleum Products, specifically published in Commodity Rate Tariffs, rates made as provided in the following rules will apply. (a) PETROLEUM AND PETROLEUM PRODUCTS, CARLOADS, CLASSIFIED FIFTH CLASS IN CURRENT WESTERN CLASSIFICATION, EXCEPT AS OTHERWISE PROVIDED IN PARAGRAPHS "B AND C." Where the Fifth Class rate, disregarding the minimum Fifth Class Rate, is the same as the figure shown in Column 1 of Table of Rates, page 24, the rate to apply will be made by adding $4\frac{1}{2}$ cents per 100 lbs., to the figure shown opposite in Column 2; Fifth Class rate from point of origin to destination not to be exceeded. (b) PETROLEUM CRUDE OIL, AND PETROLEUM GAS OIL, STRAIGHT CARLOADS, ALSO PETROLEUM FUEL OIL, VIZ., REFINERY RESIDUUM, STRAIGHT CARLOADS: Where the Class "D" rate, disregarding the minimum Class "D" Rate, is the same as the figure shown in Column 1 of Table of Rates, page 24, the rate to apply will be made by adding $4\frac{1}{2}$ cents per 100 pounds to the figure shown opposite in Column 2; Fifth Class rate from point of origin to destination not to be exceeded. (c) (Applies only on Intrastate Traffic in California). ENGINE (NAPHTHA) DISTILLATE, CARLOADS: Where the Fifth Class rate, disregarding the minimum Fifth Class Rate, is the same as the figure shown in Column 1 of Table of Rates, page 24, the rate to apply will be made by adding $4\frac{1}{2}$ cents per 100 pounds to the figure shown opposite in Column 4; Fifth Class rate from point of origin to destination not to be exceeded. Where no published through rates are in effect from point of origin to destination on Petroleum and Petroleum Products, classified Fifth Class, in the Current Western Classification, carloads, and two or more factors are used in arriving at the through rate, such through rate will be constructed in the following manner
75	Rules for Constructing PETROLEUM AND PETROLEUM PRODUCTS, CLASSIFIED FIFTH CLASS IN CURRENT WESTERN CLASSIFICATION, CARLOADS, EXCEPT AS OTHERWISE PROVIDED IN SECTIONS 2 AND 3: (a) Where the separately established Fifth Class Rate, disregarding the minimum Fifth Class Rate, is the same as the figure shown in Column 1 of Table of Rates, page 24, the factor for basing the through rate will be the figure shown opposite in Column 2 (b) Where the separately established Commodity Rate is the same as the figure shown in Column 1 of Table of Rates, page 24, the factor for basing the through rate will be the figure shown opposite in Column 3. (c) To the sum of the factors arrived at by use of formula in paragraph (a), or paragraph (b), or paragraphs (a) and (b), add $4\frac{1}{2}$ cents per 100 pounds; Fifth Class rate from point of origin to destination not to be exceeded.

Issued by
G. W. LUCE,
Freight Traffic Manager,
San Francisco, Cal.



Rule
No.

RULES AND REGULATIONS—Concluded.

SECTION 2.

PETROLEUM CRUDE OIL, AND PETROLEUM GAS OIL, STRAIGHT CARLOADS, ALSO PETROLEUM FUEL OIL, VIZ., REFINERY RESIDUEUM, STRAIGHT CARLOADS.

(a) Where the separately established Class "D" rate, disregarding the minimum Class "D" Rate, is the same as figure shown in Column 1 of Table of Rates, page 24, the factor for basing the through rate will be the figure shown opposite in Column 2.

(b) Where the separately established Commodity Rate is the same as the figure shown in Column 1 of Table of Rates, page 24, the factor for basing the through rate will be the figure shown opposite in Column 3.

(c) To the sum of the factors arrived at by use of formula in paragraph (a) or paragraph (b) or paragraphs (a) and (b) add 4½ cents per 100 pounds; Fifth Class rate from point of origin to destination not to be exceeded.

Rules for Constructing Combination Rates on Petroleum and Petroleum Products, Carloads—(See Note on Title Page also Rule 40):

SECTION 3.

ENGINE (NAPHTHA), DISTILLATE, CARLOADS. (Applies only on California Intrastate Traffic).

(a) Where the separately established Fifth Class Rate, disregarding the minimum Fifth Class Rate, is the same as the figure shown in Column 1 of Table of Rates, page 24, the factor for basing the through rate will be the figure shown opposite in Column 4.

(b) Where the separately established Commodity Rate is the same as the figure shown in Column 1 of Table of Rates, page 24, the factor for basing the through rate will be the figure shown opposite in Column 3.

(c) To the sum of the factors arrived at by use of formula in paragraph (a) or paragraph (b) or paragraphs (a) and (b), add 4½ cents per 100 pounds; Fifth Class rate from point of origin to destination not to be exceeded.

④ When the total charges on a through continuous movement of Coal and Coke, carloads, are constructed by combination of separately established class rates, or of commodity rates, or of class and commodity rates applying to and from junction or basing points, first determine the through combination of rates, in effect on June 24, 1918, and then increase such through combination of rates by the amount set opposite each such commodity, subject to Rules for disposition of fractions as shown below.

⑤ Published for the Director General of Railroads and filed on 30 days notice with the Interstate Commerce Commission under Freight Rate Authority No. 10 of the Director, Division of Traffic, United States Railroad Administration, dated July 2, 1918.

COMMODITY

Increase in cents per ton
of 2,000 lbs.

COAL:

Where rate is 0 to 49 cents per ton of 2,000 lbs.....	15
" " " 50 to 99 cents per ton of 2,000 lbs.....	20
" " " \$1.00 to \$1.99 per ton of 2,000 lbs.....	30
" " " \$2.00 to \$2.99 per ton of 2,000 lbs.....	40
" " " \$3.00 or higher per ton of 2,000 lbs.....	50

80

Rules for Constructing Combination Rates on Coal and Coke, Carloads:

COKE:

Where rate is 0 to 49 cents per ton of 2,000 lbs.....	15
" " " 50 to 99 cents per ton of 2,000 lbs.....	25
" " " \$1.00 to \$1.99 per ton of 2,000 lbs.....	40
" " " \$2.00 to \$2.99 per ton of 2,000 lbs.....	60
" " " \$3.00 or higher per ton of 2,000 lbs.....	75

RULES FOR DISPOSITION OF FRACTIONS.

Fractions resulting from computing rates provided herein will be disposed of as follows:

(a) Rates Per 100 Pounds.

Fractions of less than $\frac{1}{2}$ or .25, omit.

Fractions of $\frac{1}{2}$ or .25, or greater, but less than $\frac{1}{4}$ or .75, state as one-half ($\frac{1}{2}$), or as fifty one-hundredths (.50).

Fractions of $\frac{1}{4}$ or .75, or greater, increase to the next whole figure.

(b) Rates Per Ton.

Amounts of less than five (5) cents, drop the odd cents; thus—\$1.13 when the odd cents are dropped will be \$1.10 per ton.

Amounts of five (5) cents or more, but less than ten (10) cents, convert to ten (10) cents; thus—\$1.18 when the odd 8 cents are converted to 10 cents will be \$1.20 per ton.

♦Reduction.

Issued by

C. W. LUCE,

Freight Traffic Manager,
San Francisco, Cal.



TABLE OF RATES.

See Rules Nos. 70 and 75 for Instructions Governing Use of this Table.

Column 1	Column 2	Column 3	Column 4	Column 1	Column 2	Column 3	Column 4	Column 1	Column 2	Column 3	Column 4	Column 1	Column 2	Column 3	Column 4
3	2½	2	35½	28½	31	23	68	54½	63½	43½	100½	80½	96	64½	
3½	3	2½	36	29	31½	23½	68½	55	64	44	101	81	96½	65	
4	3	2½	36½	29	32	23½	69	55	64½	44	101	81	97	65	
4½	3½	3	37	29½	32½	23½	69½	55½	65	44½	102	81½	97½	65½	
5	4	3½	37½	30	33	24	70	56	65½	45	102½	82	98	65½	
5½	4½	1	37	30½	33½	24½	70½	56½	66	45½	103	82½	98½	66	
6	5	1½	4	38	34½	31	34	25	71	57	66½	45½	103½	99	66½
6½	5	2	4	39	31	34½	25	71½	57	67	45½	104	83	99½	66½
7	5½	2½	4½	39½	31½	35	25½	72	57½	67½	46	104½	83½	100	67
7½	6	3	5	40	32	35	25½	72½	58	68	46½	105	84	100½	67½
8	6½	3½	5½	40½	32½	36	26	73	58½	68½	47	105½	84½	101	68
8½	7	4	5½	41	33	36½	26½	73½	59	69	47½	106	85	101½	68
9	7	4½	5½	41½	33	37	26½	74	59	69½	47½	106½	85	102	68
9½	7½	5	6	42	33½	37½	27	74½	59½	70	47½	107	85½	102½	68½
10	8	5½	6½	42½	34	38	27½	75	60	70½	48	107½	86	103	69
10½	8½	6	7	43	34½	38½	27½	75½	60½	71	48½	108	86½	103½	69½
11	9	6½	7½	43½	35	39	28	76	61	71½	49	108½	87	104	69½
11½	9	7	7½	44	35	39½	28	76½	61	72	49	109	87	104½	69½
12	9½	7½	7½	44½	35½	40	28½	77	61½	72½	49½	109½	87½	105	70
12½	10	8	8	45	36	40½	29	77½	62	73	49½	110	88	105½	70½
13	10½	8½	8½	45½	36½	41	29½	78	62½	73½	50	110½	88½	106	71
13½	11	9	9	46	37	41½	29½	78½	63	74	50½	111	89	106½	71½
14	11	9½	9	46½	37	42	29½	79	63	74½	50½	111½	89	107	71½
14½	11½	10	9½	47	37½	42½	30	79½	63½	75	51	112	89½	107½	71½
15	12	10½	9½	47½	38	43	30½	80	64	75½	51½	112½	90	108	72
15½	12½	11	10	48	38½	43½	31	80½	64½	76	51½	113	90½	108½	72½
16	13	11½	10½	48½	39	44	31½	81	65	76½	52	113½	91	109	73
16½	13	12	10½	49	39	44½	31½	81½	65	77	52	114	91	109½	73
17	13½	12½	11	49½	39½	45	31½	82	65½	77½	52½	114½	91½	110	73½
17½	14	13	11½	50	40	45½	32	82½	66	78	53	115	92	110½	73½
18	14½	13½	11½	50½	40½	46	32½	83	66½	78½	53½	115½	92½	111	74
18½	15	14	12	51	41	46½	33	83½	67	79	53½	116	93	111½	74½
19	15	14½	12	51½	41	47	33	84	67	79½	53½	116½	93	112	74½
19½	15½	15	12½	52	41½	47½	33½	84½	67½	80	54	117	93½	112½	75
20	16	15½	13	52½	42	48	34	85	68	80½	54½	117½	94	113	75½
20½	16½	16	13½	53	42½	48½	34	85½	68½	81	55	118	94½	113½	75½
21	17	16½	13½	53½	43	49	34½	86	88	81½	55½	118½	95	114	76
21½	17	17	13½	54	43	49½	34½	86½	69	82	55½	119	95	114½	76
22	17½	17½	14	54½	43½	50	35	87	69½	82½	55½	119½	95½	115	76
22½	18	18	14½	55	44	50½	35½	87½	70	83	56	120	96	115½	77
23	18½	18½	15	55½	44½	51	35½	88	70½	83½	56½	120½	96½	116	77½
23½	19	19	15½	56	45	51½	36	88½	71	84	57	121	97	116½	77½
24	19	19½	15½	56½	45	52	36	89	71	84½	57	121½	97	117	77½
24½	19½	20	15½	57	45½	52½	36½	89½	71½	85	57½	122	97½	117½	78
25	20	20½	16	57½	46	53	37	90	72	85	57½	122½	98	118	78½
25½	21	21	16½	58	46½	53½	37½	90½	72½	86	58	123	98½	118½	79
26	21	21½	17	58½	47	54	37½	91	73	86½	58½	123½	99	119	79½
26½	21	22	17	59	47	54½	37½	91½	73	87	58½	124	99	119½	79½
27	21½	22½	17½	59½	47½	55	38	92	73½	87½	59	124½	99½	120	79½
27½	22	23	17½	60	48	55½	38½	92½	74	88	59½	125	100	120½	80
28	22½	23½	18	60½	48½	56	39	93	74½	88½	59½	125½	100½	121	80½
28½	23	24	18½	61	49	56½	39½	93½	75	89	60	126	101	121½	81
29	23	24½	18½	61½	49	57	39½	94	75	89½	60	126½	101	122	81
29½	23½	25	19	62	49½	57½	39½	94½	75½	90	60½	127	101½	122½	81½
30	24	25½	19½	62½	50	58	40	95	76	90½	61	127½	102	123	81½
30½	24½	26	19½	63	50½	58½	40½	95½	76½	91	61½	128	102½	123½	82
31	25	26½	20	63½	51	59	41	96	77	91½	61½	128½	103	124	82½
31½	25	27	20	64	51	59½	41	96½	77	92	61½	129	103	124½	82½
32	25½	27½	20½	64½	51½	60	41½	97	77½	92½	62	129½	103½	125	83
32½	26	28	21	65	52	60½	41½	97½	78	93	62½	130	104	125½	83½
33	26½	28½	21½	65½	52½	61	42	98	78½	93½	63	130½	104½	126	83½
33½	27	29	21½	66	53	61½	42½	98½	79	94	63½	131	105	126½	84
34	27	29½	21½	66½	53	62	42½	99	79	94½	63½	131½	105	127	84
34½	27½	30	22	67	53½	62½	43	99½	79½	95	63½	132	105½	127½	84½
35	28	30½	22½	67½	54	63	43½	100	80	95½	64	132½	106	128	85

Issued by
G. W. LUCE,
Freight Traffic Manager,
San Francisco, Cal.

UNITED STATES RAILROAD ADMINISTRATION, DIRECTOR GENERAL OF RAILROADS.

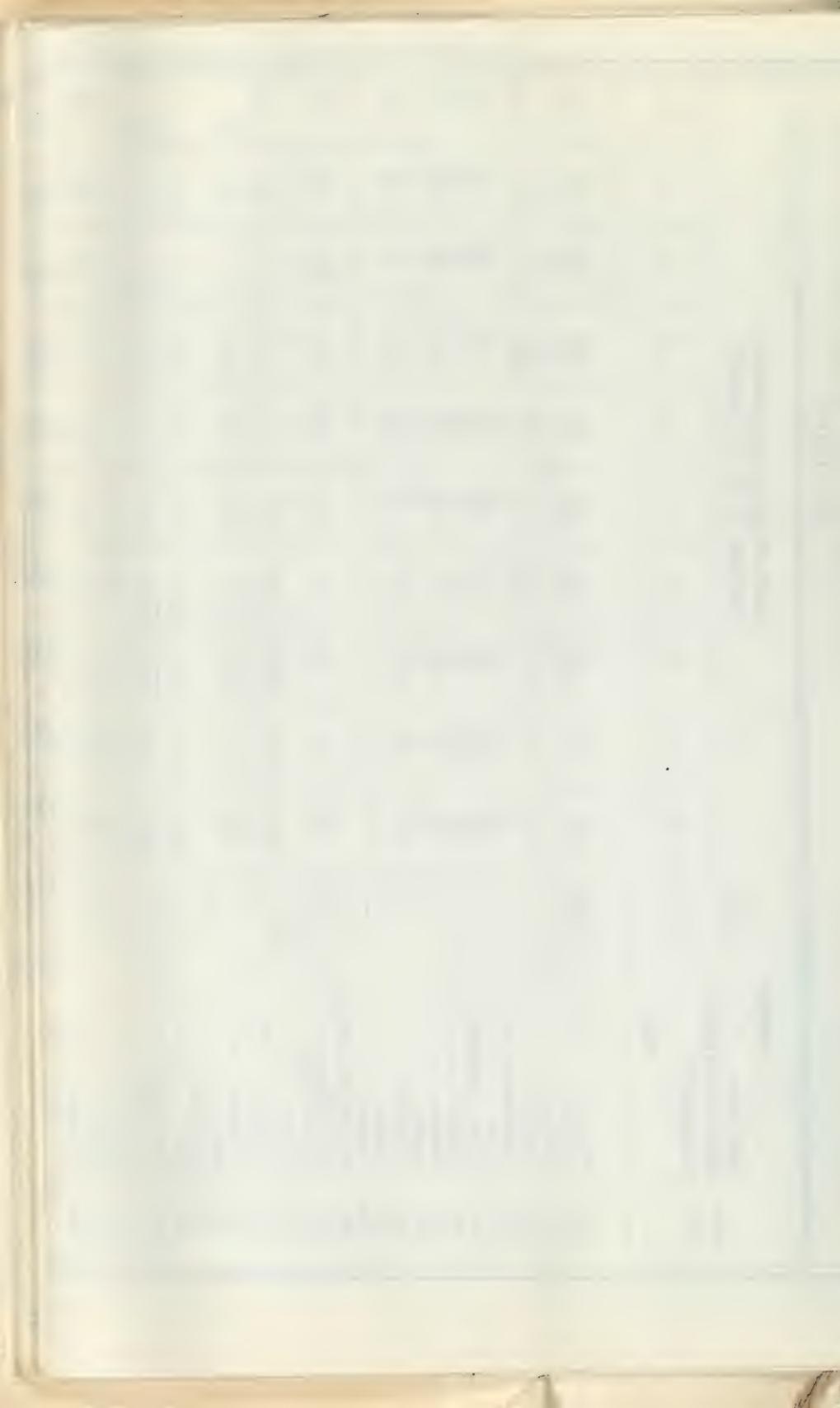
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SOUTHERN PACIFIC RAILROAD'S
LOCAL AND PROPORTIONAL FREIGHT TARIFF } I. C. C. No. 4067
No. 711-A

Index No.	Between OAKLAND.....CAL. OAKLAND WHARF....." ELMHURST..... And	RATE IN CENTS PER 100 LBS. See Rule No. 45, or as amended.									
		1	2	3	4	5	A	B	C	D	E
		15	14	12½	11½	10	10	10	7½	6½	6½
630	Prince.....Cal.	15	14	12½	11½	10	10	10	7½	6½	6½
635	Anticch....."	15	14	12½	11½	10	10	10	7½	6½	6½
640	Newlove....."										
645	Neroly....."	15	14	12½	11½	11½	12	10	9	7½	6½
650	Brentwood....."										
655	Byron....."	19	17½	16½	14	12½	12½	10	9½	9	7½
660	Byron Hot Springs....."	19	17½	16½	14	12½	12½	10	9½	9½	7½
665	Herdlyn....."	19	17½	16½	14	12½	12½	10	9½	9½	7½
670	Bethany....."	19	17½	16½	14	12½	12½	10	9½	9½	7½
675	Janney....."										
680	Flowerfield....."	20	17½	16½	14	12½	12½	10	9½	9½	7½
685	Tracy....."										
690	Banta....."										
695	San Joaquin Bridge....."	21½	19	17½	15	14	14	10	10	9½	7½
700	Lathrop....."										
705	French Camp....."	22½	20	17½	15	14	14	11½	11	10	7½
710	Hislop....."										
715	Stockton....."	22½	20	17½	15	14	14	11½	11	10	7½
720	Armburst....."										
725	El Pinal....."	22½	20	17½	15	14	14	11½	11	10	7½
730	Jarn....."										
735	Armstrong....."	22½	20	17½	15	14	14	11½	11	10	7½
740	Lodi....."										
745	Woodbridge....."	22½	20	17½	15	14	14	11½	11	10	7½
① 750	Franklyn....."										
① 755	Victor....."	22½	20	17½	15	14	14	14	14	12½	12½
① 760	Lockeford....."										
① 765	Clements....."	22½	20	17½	15	15	15	15	15	14	14
① 770	Wallace....."	26½	24	21½	21½	19	19	18	18	18	15½
① 775	Halloway....."	30	27½	24	22½	19	19	19	19	19	16½
① 780	Helisma....."	30	27½	24	22½	19	19	19	19	19	16½
	Between OAKLAND.....CAL. OAKLAND WHARF....." And										
② 785	Valley Spring.....Cal.	31½	29	25	24	20	20	20	20	17½	17½
790	Ciprieto....."	22½	20	17½	15	14	14	11½	11	10	8
795	Urgon....."										
800	Acampo....."	22½	20	17½	15	14	14	11½	11	10	8
805	Forest Lake....."	22½	20	17½	15	14	14	11½	11	10	8
810	Galt....."										
③ 815	V. nstow....."	25	21½	17½	15	14	14	11½	11½	10½	10½
③ 820	Clav....."	27½	24	20	16½	14	14	12½	12	12	12
③ 825	Carbondale....."	32½	29	25	21½	19	19	17½	17½	16½	16½
③ 830	Lignite....."	34	30	26½	22½	20	20	19	18	17½	17½
③ 835	Edwin....."										
③ 840	Clarksonna....."										
③ 845	Dagon....."	35	31½	27½	24	21½	21½	20	19	17½	17½
③ 850	Ione....."										

^a Rates apply from and to points named only. Such departure from the terms of the Constitution and Section 24 (a) of the Public Utilities Act is permitted by order of the Railroad Commission of the State of California in Decision No. 3436, dated June 19, 1916, in Case No. 214-A.

Issued by
G. W. LUCE,
Traffic Manager,
San Francisco, Cal.

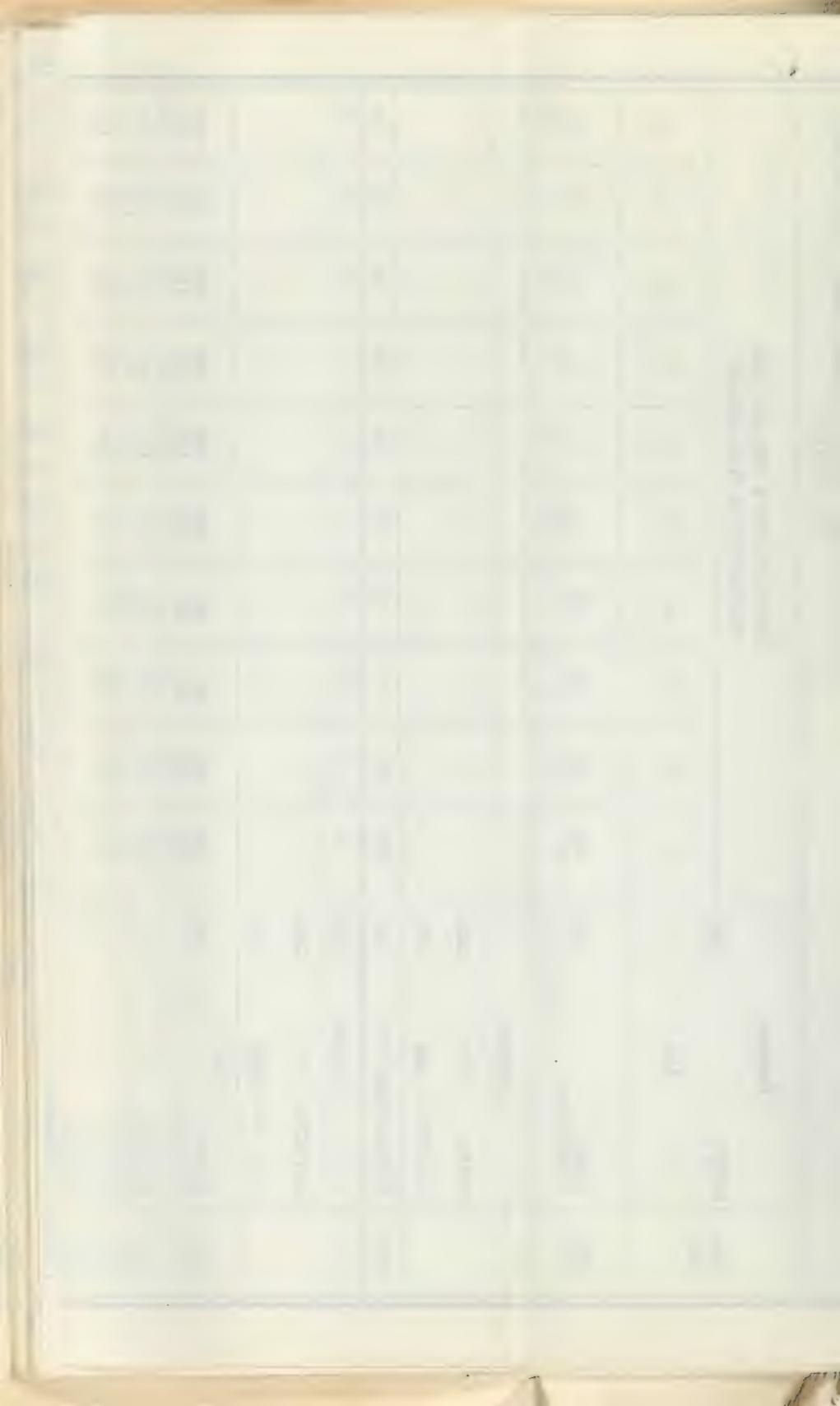


Index No.	POPPIY.....CAL.	RATE IN CENTS PER 100 LBS. See Rule No. 45, or as amended.									
		1	2	3	4	5	A	B	C	D	E
	And										
5845	Fondo.....Cal.	6½	6½	6½	6½	5	5	5	5	4½	4½
5850	Westmorland....."	14	11½	10	9	7½	6½	6½	6½	7½	7½
	Between										
	FONDO.....CAL.										
	And										
5850	Westmorland.....Cal.	12½	10	9	7½	6½	6½	6½	6½	6½	6½
	Between										
	CALEXICO.....CAL.										
	And										
5830	Estelle.....Cal.	32½	27½	24	20	16½	16½	15½	14½	12½	12½
5835	Calipatria....."	32½	27½	24	20	16½	16½	15½	14½	12½	12½
5855	Bernice....."	27½	22½	20	17½	14	14	14	13	11½	11½
5860	Rockwood....."	"	"	"	"	"	"	"	"	"	"
5865	Woods....."	25	20	17½	15	12½	12½	12½	12½	10½	10½
5870	Hovely....."	"	"	"	"	"	"	"	"	"	"
5875	Brawley....."	"	"	"	"	"	"	"	"	"	"
5880	Katsura....."	20	17½	15	12½	10	10	10	10	9½	9½
5885	Melon....."	"	"	"	"	"	"	"	"	"	"
5890	Grape....."	17½	15	14	11½	9	9	9	9	9	9
5895	Imperial....."	12½	10	9	7½	6½	6½	6½	6½	6½	6½
5900	El Centro....."	10	9	9	7½	6½	6½	6½	6½	6½	6½
5905	Heber....."	6½	6½	6½	6½	5	5	5	5	4½	4½
	Between										
	ARAZ JUNCTION.....CAL.										
	And										
5980	Cantu.....Cal.	6½	6½	6½	6½	5	5	5	5	4½	4½
	Between										
	COLORADO.....CAL.										
	And										
5995	Bard.....Cal.	16½	15	14	12½	12½	12½	12½	12½	12½	12½
6000	Sellew....."	"	"	"	"	"	"	"	"	"	"
6005	Lagunas....."	"	"	"	"	"	"	"	"	"	"
6010	Potholes....."	"	"	"	"	"	"	"	"	"	"

Issued by

G. W. LUCE,

Freight Traffic Manager,
San Francisco, Cal.



HOLTON INTER-URBAN RAILWAY COMPANY

Local Freight Tariff No. 11

(Cancels Local Freight Tariffs No. 8, 9, 10 and Supplements thereto)

NAMING CLASS AND COMMODITY RATES AND RULES AND
REGULATIONS FOR TRANSPORTATION OF FREIGHT

BETWEEN

**El Centro, California, and Holtville, California,
and Intermediate Points**

AND

DEMURRAGE AND STORAGE RULES AND RATES

Governed, except as otherwise provided herein, by the Western Classification No. 55 (I. C. C. No. 13 of R. C. Fyfe, Agent, and C. R. C. No. 180 of F. W. Gomph, Agent), supplements thereto and reissues thereof; and by exceptions to said classification, Pacific Freight Tariff Bureau Exception Sheet No. 1-F (I. C. C. No. 305 and C. R. C. No. 166 of F. W. Gomph, Agent supplements thereto and reissues thereof.

The rates made effective by this schedule are initiated by the President of the United States, through the Director General, United States Railroad Administration, and apply to both interstate and intrastate traffic.

This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25th, 1918.

ISSUED JUNE 8, 1918

EFFECTIVE JUNE 25, 1918

Approved by

A. B. WEST, President
Riverside, California

Issued by

E. B. CRIDDLE, General Agent
Riverside, California

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INDEX OF STATIONS

Points named herein from and to which rates apply.

	POINTS	FROM EL CENTRO	
El Centro	Cal.	0.00 Miles East	
*Brice	"	3.42 Miles East	
*Meloland	"	6.73 Miles East	
*Kimura Spur	"	7.23 Miles East	
Holtville	"	10.47 Miles East	

*Brice, Meloland, and Kimura Spur; non-agency points; freight must be prepaid.

INDEX OF COMMODITIES

Following list enumerates only such articles as are given specific rates; articles not specified will take Class rates.

COMMODITY	Page	ITEM	COMMODITY	Page	ITEM
Barley, Rolled	17	23	Honey	18	35
Blocks, Cement Building	18	44	Horses	17	25
Brick	17	24	Ice	18	36-37
Cattle	17	25	Maize, Milo	15	14
Coal	17	27	Milk and Cream	18	38
Corn, Egyptian & Kaffir	15	14	Mules	17	25
Cotton	17	28-29	Rails and Fastenings	18	40
Cotton Seed	17	30	Sand	18	43
Circus Outfits	17	26	Sheep	18	41
Doors, Grain	18	32	Stone	18	43
Exhibits	18	42	Ties	18	39
Flour	18	31	Tile, Building	18	44
Grapes	15	14	Trunks, not crated	20	56
Gravel	18	43	Vegetables and Fruit	18	45
Hay	18	33	Water	18	48
Hogs	18	34	Wool	18	46-47

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Section 1.—RULES AND REGULATIONS—Continued.**Tag Requirements.**

Note 2: Tags must be made of metal, leather, cloth, or rope stock or sulphite, fibre tag board sufficiently strong and durable to withstand the wear and tear incident to transportation; and

When such cloth or board tag is tied to any bag, bale, bundle or piece of freight, it must be securely attached through a reinforced eyelet.

Tags used to mark wooden pieces or wooden containers must be fastened at all corners and center with large-headed tacks or tag fasteners;

Tags may be tied to wooden pieces when the freight would be injured by the use of tacks or tag fasteners.

Tags tied to bags, bales, bundles or pieces must be securely attached by strong cord or wire, except that when tied to bundles or pieces of metal they must be securely attached by strong wire or strong tarred cord.

15 **Freight Exempt for Marking.**

(b) A shipment that fully occupies the visible capacity of a car, or that weighs 24,000 lbs. or more, when shipped from one station, in or on one car, in one day, by one shipper for delivery to one consignee at one destination, need not be marked.

Comparing Marks with Shipping Order or Bill of Lading.

(c) The marks on bundles, packages or pieces must be compared with the shipping order or bill of lading, and corrections, if necessary, made by the shipper or his representative before receipt is signed.

Old Marks to Be Removed.

(d) Old consignment marks must be removed or effaced.

Freight in Excess of Full Cars to Be Marked.

(e) Freight in excess of full cars must be marked as required for less than carload freight.

MINIMUM RATES AND CHARGES**Minimum Class Rates in cents per 100 pounds**

No rate shall be applied on any traffic moving under class rates, lower than the amount in cents per one hundred pounds for the respective classes as shown below in the current Western Classification. The minimum rate on any article shall be the rate for the class at which the article is rated in the current Western Classification.

15½

Classes	In Cents per 100 Lbs									
	1	2	3	4	5	A	B	C	D	E
Rates.....	25	21	17½	15	11	12½	9	7½	6½	5



Section 1.—CLASS RATES

ITEM NO.	BETWEEN El Centro, Cal. AND	In Cents per 100 Lbs.						In Cents per Ton of 2,000 Lbs			
		1	2	3	4	5	A	B	C	D	E
16	*Brice Cal.	25	21	17½	15	11	12½	200	150	130	100
17	*Meloland Cal.	25	21	17½	15	12½	12½	200	150	131½	112½
18	*Kimura Spur .. Cal.	25	22½	20	15	12½	12½	200	156½	144	125
19	Holtville Cal.										
	BETWEEN Brice Cal. AND										
20	*Meloland Cal.	25	21	17½	15	11	12½	200	150	130	100
	BETWEEN Holtville Cal. AND										
21	*Brice Cal.	25	21	17½	15	11	12½	200	150	130	100
22	*Meloland Cal.										

*No Agent. Freight must be prepaid.

COMMODITY RATES

ITEM NO.	COMMODITY	BETWEEN	AND	Rate in Cents Per Ton of 2000 Lbs. except as shown
23	Barley (rolled), in sacks Carloads	El Centro Cal.	Holtville Cal.	94
24	Brick (except glazed and enameled).... Carloads Estimated weight, 5 lbs. per brick. Loaded to space capacity of car.	El Centro Cal.	Holtville Cal.	115
25	Cattle, Horses and Mules Carloads	El Centro..... Cal. Holtville..... Cal.	{ Meloland..... Cal. Holtville..... Cal. Meloland..... Cal.	Per 36 ft. Car 15.00 15.00
26	Circus Outfits Carloads Including tents, seats, wagons, and imals, etc. Company to be released from all liability. Transportation of attendants or members of circus not included.	El Centro..... Cal.	Holtville..... Cal. and intermediate points	15.00 per car
27	Coal Carloads Minimum 40,000 lbs.	El Centro..... Cal.	Holtville..... Cal. and intermediate points	1.45
28	Cotton, in bales Carloads Minimum 16,000 lbs.	Holtville..... Cal. and intermediate points	El Centro..... Cal.	4.00
29	Cotton (seed) in bulk. Carloads Minimum 15,000 lbs.	Holtville..... Cal. and intermediate points	El Centro..... Cal.	4.00
30	Cotton Seed Carloads Minimum 36,000 lbs.	Holtville..... Cal. and intermediate points	El Centro..... Cal.	1.25

(DEFTS. EXHIBIT No. "F.")

TARIFFS CONTAINING RATES ON SHIPMENTS DURING A PORTION OF THE PERIOD COVERED BY EXHIBIT No. 10 (IN RECORD BEFORE INTERSTATE COMMERCE COMMISSION IN DOCKET 12890) AND TYPICAL OF THE REMAINING PERIOD COVERED BY EXHIBIT No. 10 AND BY EXHIBITS 2, 4 AND 9 (I.C.C. DOCKET 12890).

Tariff Numbers.

ICC-1048, R. H. Countiss, Agent (1-Q).

ICC-6853, AT&SF (11877).

[Endorsed]: Filed 8/27/25. [192]

C. R. C. No. 30 of C. C. McCain, Agent

(Cancels C. R. C. No. 26)

C. R. C. No. 571 of Eugene Morris, Agent

(Cancels C. R. C. No. 541)

C. R. C. No. 380 of R. H. Countiss, Agent

(Cancels C. R. C. No. 373)

Ohio No. 615 of Eugene Morris, Agent

(Cancels Ohio No. 585)

I. C. C. No. 30 of C. C. McCain, Agent

(Cancels I. C. C. No. 26)

I. C. C. No. 682 of Eugene Morris, Agent

(Cancels I. C. C. No. 647)

I. C. C. No. 1048 of R. H. Countiss, Agent

(Cancels I. C. C. No. 1036)

TRANS-CONTINENTAL FREIGHT BUREAU WEST-BOUND TARIFF No. 1-Q

(Cancels West-Bound Tariff No. 1-P, which took effect April 16, 1917, and all supplements thereto)

—NAMING—

Local, Joint, Export and Import Class Rates

Governed by Western Classification No. 54 (I. C. C. No. 12 of R. C. Fyfe, Agent), supplements thereto or reissues thereof,
except as otherwise provided herein

—AND—

Local, Joint, Export, Import and Proportional Commodity Rates

Governed by Special Rules and Conditions shown herein
—FROM—

EASTERN SHIPPING POINTS

Designated on pages 2 to 27, inclusive,
—TO POINTS IN—

ARIZONA

MEXICO

NEW MEXICO

UTAH

CALIFORNIA

NEVADA

OREGON

Designated on pages 28 to 61, inclusive.

This tariff contains rates that are higher for shorter distances than for longer distances over the same route, such departure from the terms of the amended Fourth Section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Commission Orders F. S. Nos. 3136 of date August 2, 1913, 4206, 4208, 4210, 4215 and 4216 of date August 28, 1914, 4859 of date April 27, 1915, 7046 of date November 20, 1917, and as indicated in individual items herein.

NOTE A.—By authority of Rule 77 of Interstate Commerce Commission Tariff Circular No. 18-A, this tariff is not made applicable FROM all intermediate points. Upon reasonable request therefor, commodity rates which will not exceed those in effect FROM the next more distant point will (under authority granted by the Interstate Commerce Commission) be established by the carriers parties to this tariff, FROM any intermediate point hereunder, upon one day's notice to the Commission and to the public.

NOTE B.—Departure from the Commission's rules in the publication of alternative rates bases authorized in item 26, page 71 is permitted until October 31, 1918, under authority of Interstate Commerce Commission order of September 19, 1917, unless by reissue of or supplement to this tariff it is brought into conformity with the Commission's regulations at an earlier date.

NOTE C.—Changes which result from additions of or abandonment of stations and station facilities contained in this tariff are filed under authority of the Interstate Commerce Commission's Fifteenth Section Order No. 250 of January 8, 1918, without formal hearing, which approval shall not affect any subsequent proceeding relative thereto.

ISSUED FEBRUARY 21, 1918

EFFECTIVE MARCH 15, 1918

(Except as noted in individual items)

Increased rates in this tariff are filed on ten (10) days' notice under authority of the Interstate Commerce Commission's Fifteenth Section Order No. 283 of January 21, 1918.

Increased rates in this tariff are filed on ten (10) day's notice under authority of the Interstate Commerce Commission's Fifteenth Section Order No. 364 of February 19, 1918, and Fifteenth Section Order No. 367 of February 21, 1918, without formal hearing, which approval shall not affect any subsequent proceeding relative thereto.

Reduced rates published in this tariff to become effective March 15, 1918 are issued on ten (10) days' notice under special permission of the Interstate Commerce Commission No. 45156 of February 14, 1918, to C. C. McCain, Agent, Eugene Morris, Agent, and R. H. Countiss, Agent, for and on behalf of lines for which they act as agents under powers of attorney.

ISSUED JOINTLY BY

EUGENE MORRIS, Agent,

608 South Dearborn Street,
Chicago, Ill.

R. H. COUNTISS, Agent,

608 South Dearborn Street,
Chicago, Ill.

C. C. McCAIN, Agent,

143 Liberty Street,
New York, N. Y.

(Auth. 4823)

COASTAL PLATEAU

PLATEAU COASTAL

PARTICIPATING CARRIERS.

NAME OF CARRIER	POWERS OF ATTORNEY (Filed with I. C. C.)			CONCURRENCES (Filed with I. C. C.)		
	To C. C. McCain	To E. Morris	To R.H.Counties	To carriers for which C. C. McCain is Agent	To carriers for which E. Morris is Agent	To carriers for which R.H.Counties is Agent
	FX1-No.	FX1-No.	FX1-No.	FX6-No. (Except as Noted)	FX6-No. (Except as Noted)	FX7-No. (Except as Noted)
Abilene & Southern R'y.				7	4	1
Ahnapee & Western R'y.				9 (Cor.)	21	12
Akron, Canton & Youngstown R'y Co.	8	13				1
Alabama & Vicksburg R'y.				15	23	5
Alabama Great Southern R. R.				19 (Cor.)	37	4
Alexandria & Western R'y.			3			1
Ann Arbor R. R. Co.			34	23		FX8-No. 18
Anning J. Smith Transportation Lines, Inc. (J. C. C. Van Nuyse, Receiver).					49	1
Anthony & Northern R'y Co.			1			
Arcade & Attica R. R. Corporation	5			1		
Arizona & New Mexico R'y.		13		3 (Cor.)	5	
Arizona Eastern R. R.		14		3 (Cor.)	2	
Arizona Southern R. R. Co.			7	4	2	
Arkansas & Louisiana Midland R'y Co.				6	9	16
Arkansas Western R'y.				20 (Cor.)	18	8
Ashland Coal & Iron R'y Co.					1	1
Atchison, Topeka & Santa Fe R'y Co.			38	42	32	
Atlanta & West Point R. R.				4		1
Atlanta, Birmingham & Atlantic R'y Co. (See Excep- tion 1, page 77)					1	2
Atlantic City R. R. Co.	A-1			53		
Atlantic Coast Line R. R. Co.					66	32
Baltimore & Eastern Shore Transportation Co.						1
Baltimore & Ohio R. R.:						
New York, N. Y., Philadelphia, Pa., and points on B. & O. R. R. west thereof and east of Jacobs Creek, Pa., Moundsville, New Martins- ville and Parkersburg, W. Va.	60	71		28 (Cor.)	FX8-No. 40	FX8-No. 38
Baltimore & Ohio R. R.:						
Jacobs Creek, Washington, Pa., Wheeling, Moundsville, Parkersburg, W. Va., and west thereof; also points on Ohio River Division Wheeling to Kenova, W. Va., incl.			71	28 (Cor.)	FX8-No. 40	FX8-No. 38
Baltimore & Ohio R. R. Co. (Lines Columbus, Bel- pre, Ohio, and West)			46	21 (Cor.)		FX8-No. 48
Baltimore & Ohio Chicago Terminal R. R.			12	3 (Cor.)		6
Baltimore & Sparrows Point R. R.	13			5	FX8-No. 40	FX8-No. 7
Baltimore, Chesapeake & Atlantic R'y (See Excep- tion 5, page 77)						
Baltimore Steam Packet Co.	10		11	7 (Cor.)		1
Bangor & Aroostook R. R.						2
Bath & Hammondsport R. R.	9			24 (Cor.)		1
Bauxite & Northern R'y.						2
Beaumont, Sour Lake & Western R'y Co.				8 (Cor.)	18	FX8-No. 10
Belt R'y of Chicago.				18-A	31-A	FX8-No. 28A
Bessemer & Lake Erie R. R.						
Birmingham & Northwestern R'y Co. (See Excep- tion 10, page 77)			31			3
Birmingham Southern R. R. Co.						2
Bloomsburg & Sullivan R. R.	12			7 (Cor.)		FX8-No. 9
Boston & Albany R. R. (N. Y. C. R. R., Lessee).	A-1			A-1		FX8-No. A-9
Boston & Gloucester Steamboat Co.						1
Boston & Maine R. R. (J. H. Hustis, Receiver).			21 (Cor.)	12 (Cor.)		FX8-No. 13
Bowling City, Gaylord & Alpena R. R. (Michigan Trust Co., Receiver).			30	4	16	7
Brimstone R. R. & Canal Co.				19		
Brownwood North & South R'y Co.						
Buffalo & Susquehanna R. R. Corporation	6			10	3	2
Buffalo, Rochester & Pittsburgh R'y.	30			12 (Cor.)		FX8-No. 17
Bullfrog-Goldfield R. R.				1 (Cor.)	5	
Bush Line (Geo. W. Bush & Sons Co.).				19		
Bush Terminal R. R.	24			12 (Cor.)		1
Butler County R. R. Co.					1	3

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PARTICIPATING CARRIERS—Continued.

NAME OF CARRIER	POWERS OF ATTORNEY (Filed with I. C. C.)			CONCURRENCES (Filed with I. C. C.)		
	To C. C. McCain	To E. Morris	To R.H. Countiss	To carriers for which C. C. McCain is Agent	To carriers for which E. Morris is Agent	To carriers for which R.H. Countiss is Agent
	FX1-No.	FX1-No.	FX1-No.	FX8-No. (Except as Noted)	FX6-No. (Except as Noted)	FX7-No. (Except as Noted)
© Cairo, Truman & Southern R'y.						1
Cambria & Indiana R. R. (See Exception 15, page 77)	4					1
Canadian Government R'y's (Lines Armstrong, Ont., and East thereof)				4	4	1
Canadian Northern R'y (Lines Port Arthur, Ont., and West thereof)			W-42			
Canadian Northern R'y Co. (Lines Westfort, Ont., and East thereof)		E-2			E-13	
Canadian Pacific Car & Passenger Transfer Co., Ltd.		3				
Canadian Pacific R'y		31				
Canadian Pacific R'y Lines Fort William, Ont., and East thereof)					E-7	E-14
Carolina & Northwestern R'y. (See Exception 20, page 77)						82
Carolina & Yadkin River R'y Co. (See Exception 25, page 77)						82
Carolina, Clinchfield & Ohio R'y	31					16
Catskill & New York Steamboat Co.						1
Cedar Rapids & Iowa City R'y					49	8
Central California Traction Co. (See Exception 30, page 77)			7		6	
Central Hudson Steamboat Co.						1
Central Indiana R'y Co.		30				49
Central New England R'y	12			12		1
Central of Georgia R'y				14 (Cor.)		FX8-No. 10
Central R. R. Co. of New Jersey	11			4	24	3
Central R. R. Co. of Pennsylvania				19 (Cor.)		FX8-No. 20
Central R'y of Arkansas						3
Central Vermont R'y.	16			3 (Cor.)		3
Charles City Western R'y.				15		1
Charleston & Western Carolina R'y. (See Exception 35, page 77)				4	6	2
Chesapeake & Ohio R'y (except stations between Winchester and Ashland, Ky.)	45				13	
Chesapeake & Ohio R'y Co. of Indiana	64				15	1
Chesapeake Steamship Co.					19	2
Chester Shipping Co.			1			
Chestnut Ridge R'y Co.					2	1
Chicago & Alton R. R.		50			16	
Chicago & Duluth Transportation Co.		4			2 (Cor.)	32
Chicago & Eastern Illinois R. R. Co. (William J. Jackson, Receiver)					8	10
Chicago & Erie R. R.		65			29	5
Chicago & Illinois Midland R'y.	B-2				45	10
Chicago & Illinois Western R. R.					17	FX8-No. 23
Chicago & North-Western R'y Co.					6	
Chicago & South Haven Steamship Co.		16			17	
Chicago, Burlington & Quincy R. R.		9			7	5
Chicago, Great Western R. R.		53			11	10
Chicago, Harvard & Geneva Lake R'y.		7			22 (Cor.)	8
Chicago, Indianapolis & Louisville R'y.		58			25	3
Chicago, Kalamazoo & Saginaw R'y.	66				8	12
Chicago, Milwaukee & Gary R'y.	23				22	3
Chicago, Milwaukee & St. Paul R. R.					16 (Cor.)	FX8-No. 20
Chicago, Peoria & St. Louis R. R. Co. (Bluford Wilson and William Cotter, Receivers).						FX8-No. 8
Chicago, Racine & Milwaukee Line.	78				16 (Cor.)	10
Chicago, Rock Island & Gulf R'y.	19				47	16
Chicago, Rock Island & Pacific R'y Co.					15	8
Chicago, St. Paul, Minneapolis & Omaha R'y Co.		21			11 (Cor.)	8
Chicago, Terre Haute & Southeastern R'y Co.					14	8
Chicago, West Pullman & Southern R. R.	191				23 (Cor.)	
Chippewa Valley & Northern R'y.					57	
Cincinnati, Burnside & Cumberland River R'y.					16	
Cincinnati, Findlay & Fort Wayne R'y Co. (John B. Carothers, Receiver)	13				23	9
Cincinnati, Indianapolis & Western R. R. Co.		6			14	6
Cincinnati, Lebanon & Northern R'y.		7			20 (Cor.)	6
					44	3
					2	1
					1	4
					6	FX8-No. 14
					4	

PARTICIPATING CARRIERS—Continued.

NAME OF CARRIER	POWERS OF ATTORNEY (Filed with I. C. C.)			CONCURRENCES (Filed with I. C. C.)		
	To C. McCain	To E. Morris	To R.H.Countiss	To carriers for which C. C. McCain is Agent	To carriers for which E. Morris is Agent	To carriers for which R.H.Countiss is Agent
	FX1-No.	FX1-No.	FX1-No.	FX2-No. (Except as Noted)	FX2-No. (Except as Noted)	FX7-No. (Except as Noted)
Cincinnati, New Orleans & Texas Pacific R'y.				20 (Cor.)	44	8
Cincinnatti Northern R. R. Co.		67		38		3
Clarendon & Pittsford R. R. Co. (See Exception 40, page 77)	5			2 (Cor.)		
Cleveland, Cincinnati, Chicago & St. Louis R'y Co.		87		38		3
Clinton & Oklahoma Western R'y Co.				6	2	3
Clinton, Davenport & Muscatine R'y Co. (See Ex- ception 42, page 77)						
Clyde Steamship Co.						8
Coal & Coke R'y.						4
Colorado & South-Eastern R. R.		28	22	8 (Cor.)		
Colorado & Southern R'y.			21	14		
Colorado & Wyoming R'y.			18	11 (Cor.)	17	
Colorado, Kansas & Oklahoma R. R. Co.			7	8	6	
Colorado Midland R. R. Co.			5			8
Colt's Express Co.			26	16	14	2
Coopers' own & Charlotte Valley R. R.	8					2
Copper Range R. R.				10	18	1
Cornwall R. R.	13			7		9
Coudersport & Port Allegany R. R. Co.	14	17		9 (Cor.)		FX8-No. 8
Crittenden R. R.				7 (Cor.)	15	FX8-No. 10
Crosby Transportation Co.			2	4	3	2
Crowley Launch & Tugboat Co.			9	3	32	
Cumberland & Pennsylvania R. R.	21				1	
Cumberland Valley R. R.	10 (Cor.)			7 (Cor.)	1	
Dansville & Mt. Morris R. R. (A. S. Murray, Jr., Receiver)	13 (Cor.)			17 (Cor.)	3	FX8-No. 10
Danville & Western R'y. (See Exception 45, page 77)				5 (Cor.)	13	FX8-No. 7
Dayton & Union R. R. Co.		22		82	4	
Dayton, Toledo & Chicago R. R. Co.		79		12		FX8-No. 7
Deering Southwestern R'y.				29 (Cor.)		FX8-No. 34
Delaware & Hudson Co.	18				1	
Delaware & Northern R. R.	2			13 (Cor.)	15	FX8-No. 19
Delaware, Lackawanna & Western R. R.	14 (Cor.)	17		FX8-No. 14	17	FX8-No. 24
Delaware River Transportation Co.						1
Denison & Pacific Suburban R'y Co.			19	7	FX8-No. 8	
Denver & Rio Grande R. R. (Alexander R. Baldwin and Edwin L. Brown, Receivers.) (See Exception 50, page 77)			40	7 (Cor.)	9	
De Queen & Eastern R. R.						2
Detroit & Huron R'y Co.	1				2	1
Detroit & Mackinac R'y.		25			28	
Detroit & Toledo Short Line R. R.	44			9 (Cor.)		FX8-No. 11
Detroit, Bay City & Western R. R. Co.	3				1	FX8-No. 3
Detroit, Toledo & Ironton R. R. Co.	1			10	3	FX8-No. 6
Doniphian, Kensett & Seary R'y.						2
Duluth, Missabe & Northern R'y Co. (See Exception 52, page 77)					10	4
Duluth, South Shore & Atlantic R'y.				17	3-C	6-B
Duluth, Winnipeg & Pacific R'y (See Exception 53, page 77)					11-D	
Durham & South Carolina R. R. Co. (See Exception 55, page 77)					63	1
Durham & Southern R'y Co. (See Exception 60, page 77)					82	4
Eastern Steamship Lines, Inc. (See Exception 62, page 77)	7			4	8	1
East Jordan & Southern R. R. Co.		12	10			6
Eastport Transport Co.						1
El Dorado & Wesson R'y Co.			2		3	1
Elgin, Joliet & Eastern R'y.		52		20 (Cor.)	28	11

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PARTICIPATING CARRIERS—Continued.

NAME OF CARRIER	POWERS OF ATTORNEY (Filed with I. C. C.)			CONCURRENCES (Filed with I. C. C.)		
	To C. C. McCain	To E. Morris	To R.H.Countiss	To carriers for which C. C. McCain is Agent	To carriers for which E. Morris is Agent	To carriers for which R.H.Countiss is Agent
	FX1-No.	FX1-No.	FX1-No.	FX8-No. (Except as Noted)	FX6-No. (Except as Noted)	FX7-No. (Except as Noted)
El Paso & Southwestern System:						
El Paso & Northeastern R. R. Co.			25	A-1	A-2	
El Paso & Southwestern Co.			10	A-1	A-2	
El Paso & Southwestern R. R. Co.			21	A-1	A-2	
El Paso & Southwestern R. R. Co. of Texas			23	A-1	A-2	
Erie R. R. Co. (Lines east of Buffalo and Salamanca)	17			24 (2nd Cor.)		FX8-No. 30
Erie R. R. Co. (Lines Buffalo, Salamanca and west thereof)		A-3	10	17 9 (Cor.)	14	FX8-No. 23 10
Escanaba & Lake Superior R. R.				4	45	1
Evansville & Indianapolis R. R. (Wm. P. Kappes, Receiver)		65		1	1	2
E. V. Rideout Co.						
Fairchild & Northeastern R'y.				4 (Cor.)	18	8
Fernwood & Gulf R. R. Co. (See Exception 65, page 77)						
Fonda, Johnstown & Gloversville R. R.	10			8 (Cor.)		2
Fordyce & Princeton R. R.				17 (Cor.)	30	13
Fort Dodge, Des Moines & Southern R. R. Co.						
Fort Smith & Western R. R. Co. (Arthur L. Mills, Receiver)			11	15	7	
Fort Wayne, Cincinnati & Louisville R. R.		47		17 (Cor.)		FX8-No. 21
Fort Worth & Denver City R'y.				23	7	3
Fort Worth & Rio Grande R'y. Co.				14		7
Fourche River Valley & Indian Territory R'y.						1
Frankfort & Cincinnati R'y.			4			FX8-No. 31
Fresno Interurban R'y.						
Galveston, Harrisburg & San Antonio R'y.			28	22	17	9
Georgia R. R.						
Gettysburg & Harrisburg R'y. Co.	A-1			53		
Glenmora & Western R'y.						2
Goodrich Transit Co.		43	41	10		11
Gould Southwestern R'y (W. H. Roberts, Receiver)				3	7	2
Grafton & Upton R. R.		14 (Cor.)		7 (Cor.)		FX8-No. 11
Graham & Morton Transportation Co. (The Michigan Trust Co., Receiver)			20	4		4
Grand Rapids, Grand Haven & Muskegon R'y (See Exception 70, page 77)		32		7 (Cor.)		FX8-No. 10
Grand Rapids, Grand Haven & Muskegon R'y (See Exception 70, page 77)				7 (Cor.)		3
Grand Trunk R'y System (Lines east of Detroit and St. Clair Rivers)	31	35	17	11		FX8-No. 12
Grand Trunk R'y System (Lines west of Detroit and St. Clair Rivers)		44		13		FX8-No. 14
Great Northern Pacific Steamship Co. (See Exception 71, page 77)			1			
Great Northern R'y Co.			34	46	3	
Great Western R. R.				6	6	7
Green Bay & Western R. R.			13	9 (Cor.)	21	12
Greenwich & Johnsonville R'y.		17		6	4	1
Gulf & Sabine River R. R. (Fullerton Division)			28			
Gulf & Ship Island R. R. (See Exception 72, page 78)						
Gulf Coast Lines:						
Beaumont, Sour Lake & Western R'y.			38	16 (Cor.)	26	18
Louisiana Southern R'y (N. O. T. & M. R'y Co., Lessee)				5	6	8
New Orleans, Texas & Mexico R'y Co.			33	21	17	19
Orange & Northwestern R. R. Co.				10	11	9
St. Louis, Brownsville & Mexico R'y Co.			33		7	
Gulf, Colorado & Santa Fe R'y Co.			41	42	32	
Gulf, Mobile & Northern R. R. Co.				7	5	2
Gulf, Texas & Western R'y Co.						1
Hagerstown & Frederick R'y Co.	21			83	60	19
Hardwick & Woodbury R. R.					49	1
Harlem & Morrisania Transportation Line						

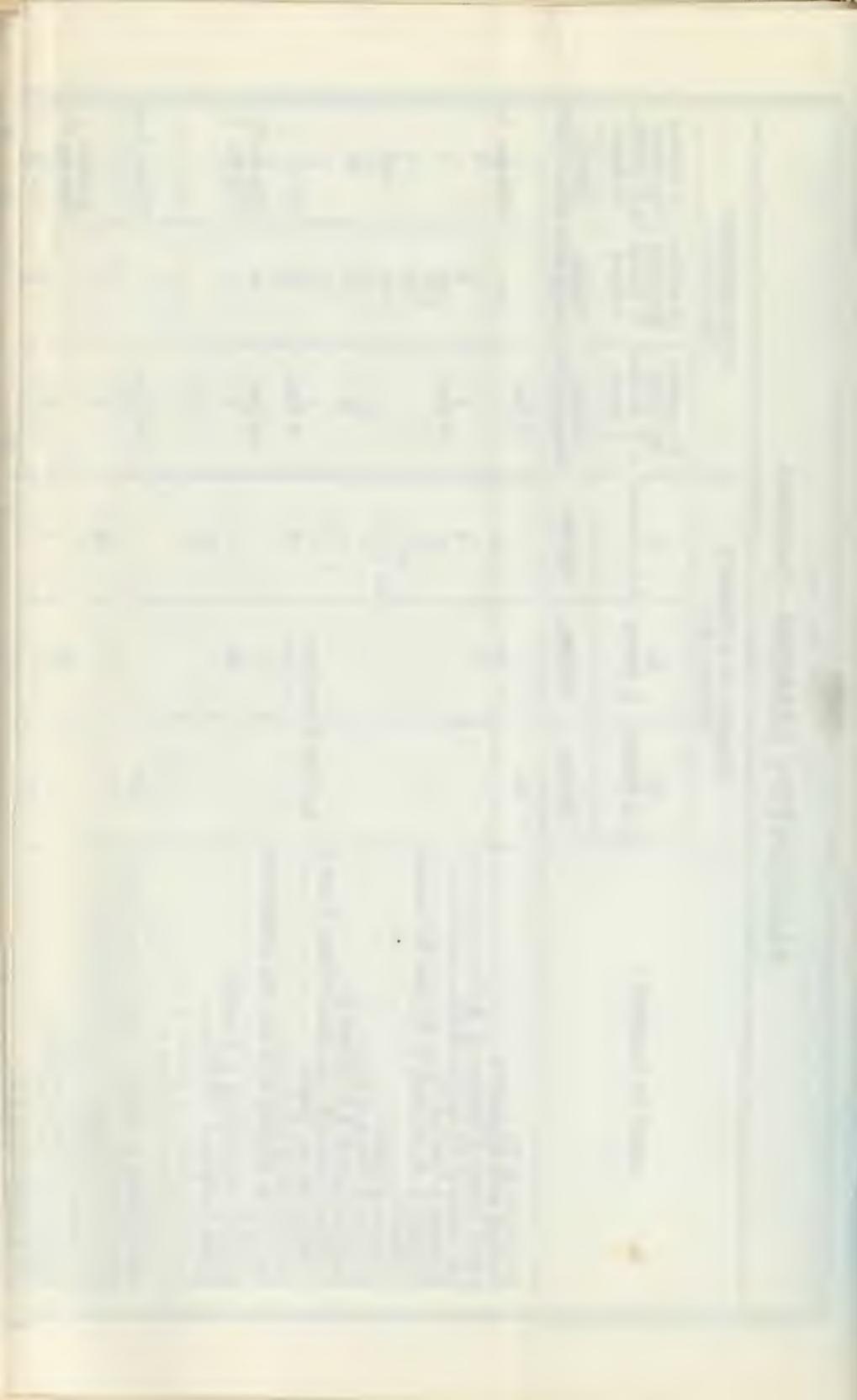


PARTICIPATING CARRIERS—Continued.

NAME OF CARRIER	POWERS OF ATTORNEY (Filed with I. C. C.)			CONCURRENCES (Filed with I. C. C.)		
	To C. C. McCain	To E. Morris	To R.H.Countiss	To carriers for which C. C. McCain is Agent	To carriers for which E. Morris is Agent	To carriers for which R.H.Countiss is Agent
	FX1-No.	FX1-No.	FX1-No.	FX8-No. (Except as Noted)	FX6-No. (Except as Noted)	FX7-No. (Except as Noted)
Hartford & New York Transportation Co.						5
Helena, Parkin & Northern R'y.						1
Hill Steamboat Line			13		12	8
Hoboken Manufacturers' R. R.	20			10 (Cor.)		FX8-No. 14
Hocking Valley R'y.		45		10 (2nd Cor.)		
Houston & Brazos Valley R'y Co. (Geo. C. Morris, Receiver)						1
Houston & Shreveport R. R.					18	10
Houston & Texas Central R. R.					18	8
Houston East & West Texas R'y.					18	9
Hudson Navigation Co.					5	3
Huntingdon & Broad Top Mountain R. R. & Coal Co.	13				8	
Iberia & Vermillion R. R.			14			
Illinois Central R. R.	152	145		14 (Cor.)		
Illinois Northern R'y.		37			40	
Illinois Southern R'y.		21			25	
Illinois Terminal R. R.		35			10	
Indiana Harbor Belt R. R.	38			16 (Cor.)		12
International & Great Northern R'y Co. (James A. Baker, Receiver)					27	FX8-No. 21
Inter-Urban R'y Co.					7	11
Iowa & St. Louis R'y.		14		10 (Cor.)	13	4
Iowa & Southwestern R'y.					16	21
Iowa Southern Utilities Co.		3			1	1
Ironton R. R.	21			2 (Cor.)	7	FX8-No. 4
Jonesboro, Lake City & Eastern R. R.					6	3
Kalamazoo, Lake Shore & Chicago R'y Co.		1				2
Kanawha & Michigan R'y.		33		9 (Cor.)		FX8-No. 11
Kanawha, Glen Jean & Eastern R. R. Co.	10				24	13
Kane & Elk R. R. Co.	15		13		9	5
Kansas City & Memphis R'y Co. (J. E. Felker and R. C. Bright, Receivers)					1	
Kansas City, Clinton & Springfield R'y.		1			3	2
Kansas City, Kaw Valley & Western R'y.		12			1	7
Kansas City, Mexico & Orient R. R. Co. (William T. Kemper, Receiver)					19	2
Kansas City, Mexico & Orient R'y Co. of Texas.					20	26
Kansas City Northwestern R. R. (L. S. Cass, Re- ceiver).		128			20	26
Kansas City Southern R'y.					7	1
Kansas Southwestern R'y.					23	6
Keweenaw, Green Bay & Western R. R.		12			18	
Kinder & Northwestern R. R. Co. (See Exception 75, page 78)		13		9 (Cor.)	21	12
Lackawanna & Wyoming Valley R. R. Co.	14					2
La Crosse & Southeastern R'y.						
Lake Charles & Northern R. R. Co.					9	FX8-No. 8
Lake Erie & Western R. R.		2				5
Lakeside & Marblehead R. R.		49			4	4
Lake Superior & Ishpeming R'y.		23		17 (Cor.)		FX8-No. 21
L'Anquille River R'y Co.			12		11	FX8-No. 2
Las Vegas & Tonopah R. R.		3			4	
Leavenworth & Topeka R'y Co. (W. A. Austin, Re- ceiver).		6		2 (2nd Cor.)	21 (Cor.)	
Lehigh & Hudson River R'y.	16		20		2	
Lehigh & New England R. R.					2	FX8-No. 15
Lehigh Valley R. R.	23			12 (Cor.)	32	FX8-No. 14
Litchfield & Madion R'y.	11			11 (Cor.)		FX8-No. 35
Little Rock, Maumelle & Western R. R.			31		36	
					14	11
					27	2

PARTICIPATING CARRIERS—Continued.

NAME OF CARRIER	POWERS OF ATTORNEY (Filed with I. C. C.)			CONCURRENCES (Filed with I. C. C.)		
	To C. C. McCain	To E. Morris	To R.H.Countiss	To carriers for which C. C. McCain is Agent	To carriers for which E. Morris is Agent	To carriers for which R.H.Countiss is Agent
	FX1-No.	FX1-No.	FX1-No.	FX8-No. (Except as Noted)	FX8-No. (Except as Noted)	FX7-No. (Except as Noted)
Long Island R. R.	18			12 (Cor.)		
Lorain & West Virginia R'y.		7				FX8-No. 4
Lorain, Ashland & Southern R. R. Co.		1	6		2	2
Los Angeles & Salt Lake R. R. Co.				2	2	
Louisiana & Arkansas R'y.				11 (Cor.)	16	8
Louisiana & North West R. R. (Geo. W. Hunter, Receiver).					10	3
Louisiana & Pacific R'y.						8
Louisiana & Pine Bluff R'y Co.						1
Louisiana Railway & Navigation Co.				16	23	10
Louisiana Southern R'y Co. (New Orleans, Texas & Mexico R'y Co., Lessor).	See Gulf C	oast Lines.	19	9 (Cor.)	8	
Louisiana Western R. R.						
Louisville & Nashville R. R. Co. (See Exception 80, page 78).		55		25 (Cor.)	44	FX8-No. 31
Louisville, Henderson & St. Louis R'y.				9		FX8-No. 7
Lufkin, Hemphill & Gulf R'y.						1
Maine Central R. R. Co.	C-4			C-8 (Cor.)		FX8-No. C-10
Maine Coast Co.				3		1
Mallory Steamship Co.			48	5		
Manchester & Oneida R'y Co.						FX8-No. 2
Manistee & Northeastern R. R.	35					FX8-No. 11
Manistique & Lake Superior R. R.	9	8		2		4
Mansfield R'y & Transportation Co.						2
Manufacturers R'y Co.						
Marinette, Tomahawk & Western R. R. Co.		10				
Marquette & Bessemer Dock & Navigation Co.						
Marshall & East Texas R'y Co. (Bryan Snyder, Receiver).		14		18-A	31-A	FX8-No. 28-A
Maryland & Pennsylvania R. R.	11 (Cor.)					
Maryland, Delaware & Virginia R'y.	10	11		8	6	1
Mason City & Clear L'ke R'y Co.		15		9		
Memphis, Dallas & Gulf R. R.				6	9	5
Meridian & Memphis R'y Co.					5	
Michigan Central R. R. Co.	51			23		5
Michigan East & West R'y Co.	8 (Cor.)	1			4	
Michigan R'y Co.				3	1	
Middlesex Transportation Co.					49	1
Midland Valley R. R.			8 (Cor.)			
Mineral Point & Northern R'y Co.		24		8	9	1
Mineral Range R. R.		9		6	16	11
Minkler Southern R'y.						
Minneapolis & St. Louis R. R. Co.	M. R. 15	A-3		3-C	11-D	6-B
Minneapolis, St. Paul & Sault Ste. Marie R'y.		22		B-1	B-3	
Minneapolis, St. Paul, Rochester & Dubuque Elec- tric Traction Co. (C. E. Warner, Receiver) (See Exception 82, page 78).		24		9	19	
Mississippi Central R. R.					20	
Mississippi River & Bonne Terre R'y.				15	18	5
Missouri & North Arkansas R. R. Co. (Festus J. Wade, Receiver).					8	3
Missouri, Kansas & Texas R'y Co. (C. E. Schaff, Receiver).					20	7
Missouri, Kansas & Texas R'y Co. of Texas (C. E. Schaff, Receiver).				23	23	
Missouri, Oklahoma & Gulf R'y Co. (Alexander New and Henry C. Ferris, Receivers).				28	25	
Missouri, Oklahoma & Gulf R'y Co. of Texas.				29	5	8
Missouri Pacific R'y Co. (B. F. Bush, Receiver).				19	3	3
Missouri Pacific R. R. Co.				137	87	FX8-No. 82
Missouri Pacific R. R. Corporation in Illinois.				137	87	FX8-No. 82
Missouri Pacific R. R. Corporation in Nebraska.				143	87	FX8-No. 32
Mobile & Ohio R. R. Co.				137	87	35
Modesto & Empire Traction Co.				99	13	
Monongahela R'y Co.					5	1
Montour R. R. Co.	4	23				



PARTICIPATING CARRIERS—Continued.

NAME OF CARRIER	POWERS OF ATTORNEY (Filed with I. C. C.)			CONCURRENCES (Filed with I. C. C.)		
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	FX1-No.	FX1-No.	FX1-No.	FX8-No. (Except as Noted)	FX6-No. (Except as Noted)	FX7-No. (Except as Noted)
Montpelier & Wells River R. R.	11			17 (Cor.)		FX8-No. 20
Morenci Southern R'y Co.			5	6	3	
Morgan's Louisiana & Texas R. R. & S. S. Co.			24	8 (Cor.)		
Morgantown & Kingwood R. R.	15			4	FX8-No. 40	FX8-No. 6
Morrisstown & Erie R. R.	12			14		
Moshassuck Valley R. R.	11			18	17	
Mt. Jewett, Kinzua & Riterville R. R. Co.	7			6	4	2
Munising, Marquette & Southeastern R'Y.			1	3	7	1
Muscatine, Burlington & Southern R. R. Co.		6		11	7	5
Nashville, Chattanooga & St. Louis R'y.				26	25	5
Natchez & Southern R'y.				12	15	5
Nevada-California-Oregon R'y.			6	5		11
Nevada Northern R'y.				2	2 (Cor.)	FX8-No. 2
Newark & Marion R'y Co. (Harold C. Beatty, Receiver)	12 (Cor.)			7 (Cor.)	3	FX8-No. 9
Newark Express & Transportation Co.				2 (Cor.)	49	1
Newark Lighterage Co.						
New England Steamship Co.				6		FX8-No. 4
New Iberia & Northern R. R. (See Exception 85, page 78)						
New Jersey & New York R. R.	9			11	3	FX8-No. 15
New Jersey, Indiana & Illinois R. R.			19	17		
New Mexico Central R. R. Co. (Ralph E. Twitchell, Receiver).						
New Orleans & Northeastern R. R.				8 (Cor.)	2	5
New Orleans Great Northern R. R.				14	23	5
New Orleans, Texas & Mexico R'y Co.					22	8
New York & Hastings Steamboat Co.					49	
New York & Long Branch R. R.				14 (Cor.)		FX8-No. 16
New York & New Jersey Steamboat Co.					49	1
New York & Pennsylvania R'y.					9 (2nd Cor.)	FX8-No. 11
New York Central R. R. Co. (Line Buffalo, N. Y., Clearfield, Pa., and East).	13 (Cor.)			N. Y. C. No. 4	FX8-N. Y. C.	FX8-N. Y. C.
New York Central R. R. Co. (Line Buffalo, N. Y., Clearfield, Pa., and West).		N. Y. C. No. 3	{ L. S. Series No. 1 63	{ L. S. Series No. 3 14	{ L. S. Series No. 8 17	{ L. S. Series No. 5 14
New York, Chicago & St. Louis R. R.						
New York, New Haven & Hartford R. R.	18 (Cor.)				10 (Cor.)	FX8-No. 11
New York, Ontario & Western R'y.	13				14	1
New York, Philadelphia & Norfolk R. R.	13				24 (Cor.)	FX8-No. 16
New York, Susquehanna & Western R. R.	9					
New York, Westchester & Boston R'y Co.	4					
Norfolk & Washington (D. C.) Steamboat Co.						
Norfolk & Western R'y Co.			73		25 (Cor.)	4
Norfolk Southern R. R. Co.					11	1
North & East River Steamboat Co.					26	10
Northern Alabama R'y.					49	2
Northern Electric R'y Co. (John P. Coghlan, Re- ceiver)					68 (Cor.)	4
Northern Electric R'y Co., Marysville and Colusa Branch				5		1
Northern Michigan Transportation Co.						1
Northern Ohio R'y.	28					9
Northern Pacific R'y Co.	47			17 (Cor.)		FX8-No. 21
North Louisiana & Gulf R. R.				38		
North Pacific Steamship Co. (See Exception 87, page 78)					FX8-No. 31	1
Northwestern Pacific R. R.						
Norwich & New York Propeller Co.						
Oakdale & Gulf R'y Co.						1
Oakland, Antioch & Eastern R'y.						
Ocean Steamship Co. of Savannah				5	1	
Oklahoma, New Mexico & Pacific R'y Co.					13	1
Okmulgee Northern Railway				3		
Old Dominion Steamship Co.				4		5
					49	1

PARTICIPATING CARRIERS—Continued.

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	FX1-No.	FX1-No.	FX1-No.	FX8-No. (Except as Noted)	FX8-No. (Except as Noted)	FX7-No. (Except as Noted)
Orange & Northwestern R. R. Co.	See Gulf C	east Lines.	40	4	3	
Oregon Short Line R. R. (See Exception 90, page 78)		7		8		
Ouchita Valley R'y Co.						
Pacific Electric R'y Co. (See Exception 95, page 78).		12	2	1	3	2
Pacific Steamship Co.			1	1		
Panhandle & Santa Fe R'y Co.		8	42	32		
Paris & Great Northern R. R. Co.			35	34	8	
Paris & Mt. Pleasant R. R.			1	2	1	2
Pascagoula-Moss Point Northern R. R. Co.						1
Peninsular R'y Co. (See Exception 100, page 78).	31 (Cor.)	95		43 (Cor.)	FX8-No. 106	
Pennsylvania R. R. Co.				FX8-No. 32	FX8-No. 30	
Pennsylvania R. R. Co. (Western Lines).					37	
Pennsylvania Terminal R'y.					16	
Peoria R'y Terminal Co.	29	28	16			
Pere Marquette Line Steamers.	31		7			
Pere Marquette R'y Co.	62		11 (Cor.)	12	FX8-No. 10	
Petaluma & Santa Rosa R'y.		3	2	33	FX8-No. 16	
Philadelphia & Reading R'y Co.	A-1		53			
Pittsburgh & Lake Erie R. R. Co.		44	7 (Cor.)			
Pittsburgh & West Virginia R'y Co.		3				
Pittsburgh, Chartiers & Youghiogheny R'y Co.		33	4			
Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co.		121	FX8-No. 36	11		
Pittsburgh, Lisbon & Western R. R. Co.		26	12 (Cor.)			
Pittsburgh, Shawmut & Northern R. R. (Frank Sullivan Smith, Receiver).	11		9 (Cor.)			
Pittsburgh & Shawmut R. R.	4		6			
Pontiac, Oxford & Northern R. R.		27				
Port Chester Transportation Co.						
Prattsburgh R'y Corporation	7		5	49	1	
Prescott & Northwestern R. R. Co.		3	5	14	FX8 No. 6	
					7	
Quanah, Acme & Pacific R'y Co.						6
Quincy, Omaha & Kansas City R. R.		12	10 (Cor.)	10		21
				16		
Rahway Valley Co.	4		5			
Rapid R. R.		18		4 (Cor.)		
Raritan River R. R.	18			7 (Cor.)		
Red River & Gulf R. R.				20 (Cor.)		
Reynoldsville & Falls Creek R. R.	11					
Rhode Island Company						
Richmond, Fredericksburg & Potomac R. R.	28		18			
Rio Grande & Eagle Pass R'y.				12 (Cor.)		
Rio Grande, El Paso & Santa Fe R. R. Co.		7	D-1			
Rock Island Southern R. R.		8	42	32		
Rock Island Southern R'y.		8	6	4		
Roscoe, Snyder & Pacific R'y.			6	4		
Rutland R. R.	18		7	4		
			15 (Cor.)			
Sacramento & Woodland R. R.						4
St. Johnsbury & Lake Champlain R. R.	20 (Cor.)					
St. Joseph & Grand Island R'y.				12 (Cor.)		
St. Joseph-Chicago Steamship Co.		1		12 (Cor.)		
St. Joseph Valley R'y Co.		7				
St. Lawrence & Adirondack R'y.	4					
St. Louis & Hannibal R'y.						
St. Louis, Brownsville & Mexico R'y Co.			11	26		
St. Louis, El Reno & Western R'y Co. (Arthur L. Mills, Receiver)	See Gulf C	east Lines.				
			10			
					15	
						7



PARTICIPATING CARRIERS—Continued.

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	FX1-No.	FX1-No.	FX1-No.	FX8-No. (Except as Noted)	FX6-No. (Except as Noted)	FX7-No. (Except as Noted)
St. Louis, Kennett & Southeastern R. R. Co. (See Exception 105, page 78.)						3
St. Louis Merchants Bridge Terminal R'y Co.			153	11 (Cor.)	FX7-No. 13	11
St. Louis-San Francisco R'y Co.				35	34	8
St. Louis, San Francisco & Texas R'y Co.				27	19	13
St. Louis Southwestern R'y Co.				30 (Cor.)	FX8-No. 43	3
St. Louis Southwestern R'y Co. of Texas.				17 (Cor.)	6	2
Salina Northern R. R.						1
San Antonio & Aransas Pass R'y						4
San Antonio, Uvalde & Gulf R. R. Co. (Duval West and A. R. Ponder, Receivers)						2
San Diego & Arizona R'y Co.				3	1	3
Sand Springs R'y Co.						2 (Cor.)
Sandy River & Rangeley Lakes R. R.	4		1	5 (Cor.)		FX8-No. 7
Santa Maria Valley R. R.						1
Saugetics & New York Steamboat Co.					49	1
Seaboard Air Line R'y Co.				20	63	30
Sidell & Olney R. R. Co.	4			4	4	4
South Brooklyn R'y Co.	24			8 (Cor.)	49	
Southern Pacific Co.			21	12 (Cor.)	13	FX8-No. 10
Southern Pacific Co.-Atlanta S. S. Lines (Morgan Line).						
Southern Pacific R. R. Co. of Mexico.				A-27	A-5, A-6	
Southern R'y Co. (See Exception 110, page 78.)				A-3		
Southern R'y, line east of East St. Louis, Ill., to Louisville, Ky., inclusive, including branches; also all stations in Kentucky, except Fonda and Middlesboro.				68 (Cor.)	82	4
Southern R'y in Mississippi.			C-45	68 (Cor.)	C-25	C-5
South Manchester R. Co.			32	6		
Southwestern R'y Co. (A. C. Parks, Receiver).				18	17	
Spokane, Portland & Seattle R'y.				10		
Stanley, Merrill & Phillips R'y Co.				9	5	
Starin New Haven Line.				8	9	
Staten Island Rapid Transit R'y.					49	1
Stewartstown R. R.	13				15 (Cor.)	
Stewartstown R. R.	12				16 (Cor.)	
Stones Express, Incorporated.	6					3
Sugarland R'y Co.						FX8-No. 1
Sunset Railway Co.						2
Susquehanna & New York R. R.	12 (2nd Cor.)			9 (Cor.)		FX8-No. 12
Susquehanna, Bloomsburg & Berwick R. R.	12			10		FX8-No. 16
Tennessee, Alabama & Georgia R. R. Co.				10		2
Tennessee Central R. R. (W. K. McAlister and H. W. Stanley, Receivers).						4
Terminal R. R. Ass'n of St. Louis.					11 (Cor.)	FX7-No. 13
Texarkana & Fort Smith R'y.			22	13 (Cor.)	.17	8
Texas & New Orleans R. R.			17	9 (Cor.)	15	
Texas & Pacific R'y (J. L. Lancaster and Pearl Wright, Receivers).				31	37	FX8-No. 38
Texas City Terminal Co.					14	8
Texas Mexican R'y Co.				16	7	
Texas Midland R. R.					8	7
Texas, Oklahoma & Eastern R. R.	2			10 (Cor.)		
Texas Short Line R'y Co.	13				16	2
Texas South-Eastern R. R. Co.						1
Texas State R. R.						1
Thornton & Alexandria R'y.						3
Tidewater Southern R'y.				7	1	
Tidewater Transportation Co.						
Timpson & Henderson R'y.	12 (Cor.)					1
Tionesta Valley R'y.						FX8-No. 11
Toledo & Ohio Central R'y.			42		31	FX8-No. 11

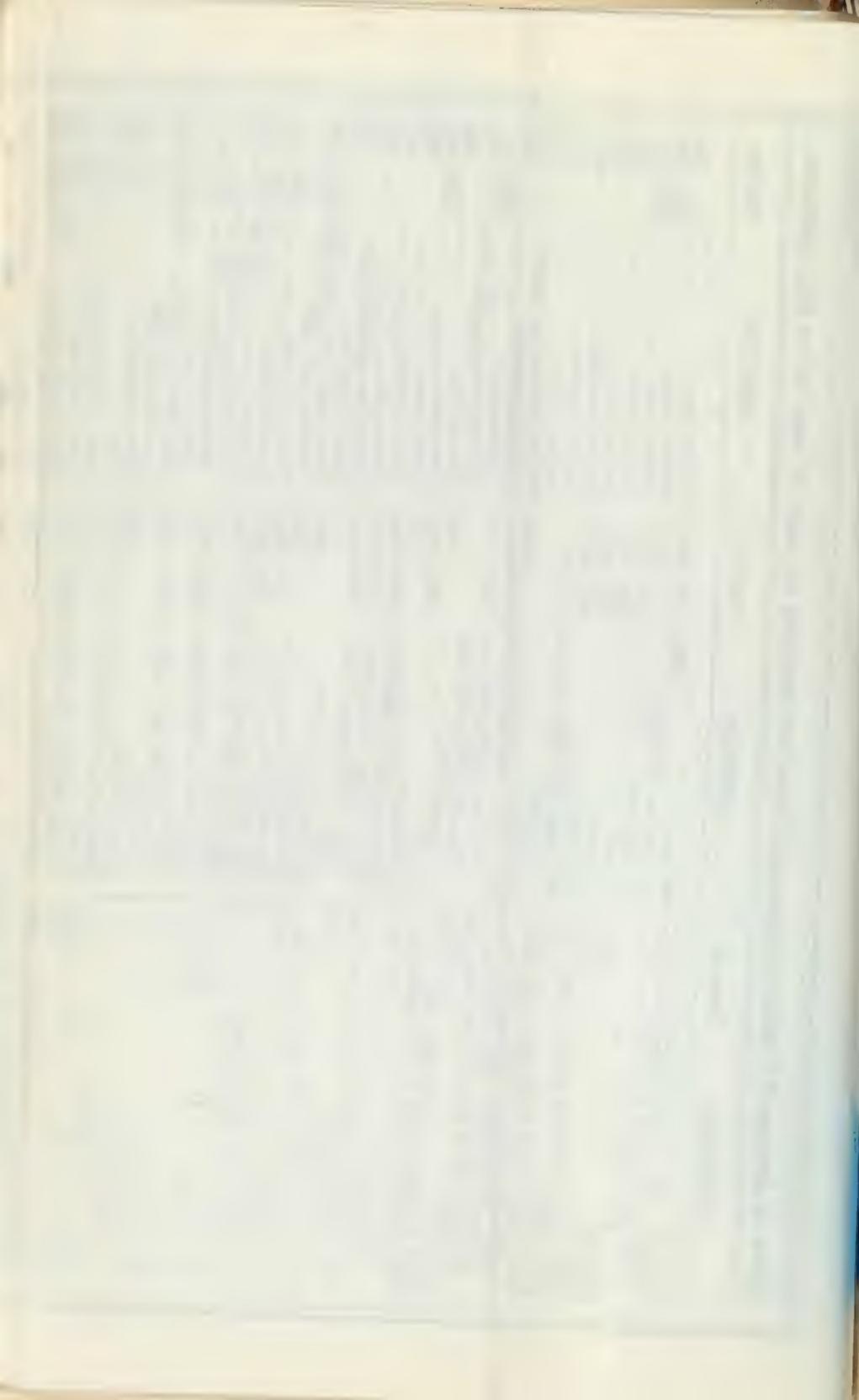
*Effective April 15, 1918. ELIMINATE. Line abandoned. See Note C on title page.

**Issued under authority of and in compliance with order of Interstate Commerce Commission in Case No. 7244 of January 12, 1918. Must be maintained for a period of two years from March 15, 1918.



Index of Articles for which Commodity Rates are provided on pages 67 and 141 to 421, inclusive.

ARTICLES	Item No.	ARTICLES	Item No.	ARTICLES	Item No.
Nutlocks, iron or steel, 2860, 2865, 4654 to 4674, incl., 4676, 4678, 4898 to 4918, incl., 4924, 5758 to 5766, incl.		Oil, pine.....	3220, 5026, 5028	Packing, flax.....	3250
Nutmegs.....	1695	Oil, pine tar, flotation.....	5382	Packing, grass.....	3248, 3250
Nuts, axle.....	2785	Oil, rape seed.....	3220, 5026	Packing, hay.....	3245, 3250
Nuts, brass, bronze or copper.....	435, 440	Oil, red.....	3220, 5026	Packing, hemp.....	3245
Nuts, edible.....	1370	Oil, rubber.....	3220, 5026	Packing, jute.....	3245
Nuts, iron or steel, 2860, 2865, 3080, 4858 to 4878, incl., 4880 to 4896, incl., 4654 to 4674, incl., 4676, 4678, 4898 to 4918, incl., 4924, 4938, 4940, 5758 to 5766, incl.		Oil, salad, 465, 3385, 4098 to 4110, incl., 5576, 5928		Packing, metallic.....	3250
Nuts, pinon.....	5354	Oil, solar.....	5358	Packing, raw-hide.....	3250
Nuts, track.....	3480, 5088, 5868, 5870	Oil, tallow, 1410, 1415, 3220, 5026, 5034 to 5058, incl., 5052 to 5068, incl., 5388, 5390, 5392, 5394, 5396, 5818, 5952		Packing, rubber.....	1100
Nuts, vehicle.....	2785, 3865	Oil, transformer.....	760	Packing, soapstone.....	3250
O		Oil, "Y".....	3220, 5026	Packing, straw.....	3245, 3250
Oatmeal.....	2200, 4154, 5580	Oilers, hand.....	3755	Padding, table, quilted cotton.....	710
Oats, 555, 4116 to 4150, incl., 4170 to 4178, incl., 5258, 5424	3175	Oils, compounded petroleum, 3240, 5370		Pads, collar.....	2660
Oats, rolled.....	2200, 4154, 5580	Oils, cooking (cottonseed), 1410, 1415, 5034 to 5050, incl., 5052 to 5068, incl., 5388 to 5390, incl., 5392, 5394, 5396, 5818, 5952		Pads, cotton.....	2320, 2325
Off-sets, brass, bronze or copper, 435, 440		Oils, paint.....	3220, 5026	Pads, harness.....	2660
Oil Board.....	3315	Oils, transel, 33, 760, 3220, 5026, 5778 to 5792, incl.		Pads, horseshoe.....	1425
Oil Board, paper.....	1455	Oleomargarine, 685, 4300 to 4316, incl., 5630		Pads, sweat.....	2660
Oil, castor.....	3220, 5026	Olives, canned, 465, 4098 to 4110, incl., 5576, 5928		Pads, table, quilted cotton.....	710
Oil Cloth.....	2190	Olives, pickled.....	3385	Pails, iron or steel.....	3755
Oil, cocoanut.....	3220, 5026	Omnibusses, vault, iron.....	1170	Pails, paper, 1445, 1920, 3300, 3955, 5234 to 5248, incl., 5904	
Oil, corn.....	3220, 5026	Onions.....	875	Pails, wooden or fibre, 1920, 3955, 5234 to 5248, incl., 5904	
Oil, cottonseed, 1410, 1415, 3225, 3255, 5034 to 5050, incl., 5052 to 5068, incl., 5388 to 5390, incl., 5392, 5394, 5396, 5818, 5952, 5958		Onions, pickled, 465, 3385, 4098 to 4110, incl., 5576, 5928		Pails, woodpulp.....	1445, 3300
Oil, creosote.....	1375, 1380, 5350	Onyx.....	1700, 3665	Paint.....	1430, 5820
Oil, crude, 5372, 5374, 5376, 5378, 5380, 5390, 5794 to 5800, incl.		Openers, bottle.....	111, 2545	Paint, chemical, dry.....	3265, 3275
Oil, denatured soap.....	1385	Openers, can.....	111, 2545	Paint, chemical, in oil.....	3265, 3275
Oil, fuel, 5372, 5374, 5376, 5378, 5380, 5794 to 5800, incl.		Ore, bauxite.....	5384	Paint, earth, dry.....	3265, 3275
Oil, fuel.....	700, 2315	Ore, chrome, 595, 4198 to 4212, incl., 5586 to 5592, incl.		Paint, earth, in oil.....	3265, 3275
Oil, gas, 5366, 5358, 5364, 5794 to 5800, incl.		Ore, iron.....	1400	Paint, lead and zinc, combined, dry.....	3265, 3275
Oil, kalan.....	3220, 5026	Ores, antimony.....	5428	Paint, lead and zinc, combined, in oil.....	3265, 3275
Oil, lard, 1410, 1415, 3220, 5026, 5034 to 5050, incl., 5052 to 5068, incl., 5388 to 5396, incl., 5818, 5952, 5958		Organs.....	1335	Paint, lead, in oil.....	3265, 3275
Oil, linseed.....	3220, 3230, 5026	Organs, pipe.....	1335	Paint, lithopone.....	3265, 3275
Oil, lucol.....	3220, 5026	Ornaments, stoves.....	1335	Paint, mineral, dry.....	3265, 3275
Oil, neatsoot, 1410, 1415, 3220, 5026, 5034 to 5050, incl., 5052 to 5068, incl., 5388 to 5396, incl., 5818, 5952, 5958		Ornaments, turned wood.....	2435	Paint, mineral, in oil.....	3265, 3275
Oil, neptene, 5794 to 5800, incl.		Ovens, bake, cast-iron.....	2715	Paint, prepared, in oil.....	3265, 3275
Oil, perfume, 5372, 5374, 5376, 5378, 5380, 5794 to 5800, incl.		Ovens, bakers'.....	1080	Paint, zinc, dry.....	3265, 3275
Oil, paint, N. O. S.	3220	Ovens, portable bake.....	2690	Pajamas, linen or cotton.....	830
Oil, palm.....	3220, 5026	Ovens, sheet iron.....	5960	Pans, agitator.....	5778 to 5792, incl.
Oil, peanut.....	1390	Ovens, stove.....	2685, 5062	Pans, amalgamating, 33, 5778 to 5792, incl.	
Oil, petroleum, 3240, 5358, 5368, 5370, 5372, 5374, 5376 to 5380, incl., 5794 to 5800, incl.		Overalls, cotton.....	620, 2225	Pans, cleaning.....	33, 5778 to 5792, incl.
Oil (petroleum), road, 1395, 3240, 5352 to 5380, incl.		Overflow, brass, bronze or copper, 435, 440		Pans, dripping.....	3765, 3766
Packing, aluminum fibre.....		Oxide, zinc.....	5380	Pans, drip, water cooler.....	3885
Packing, asbestos, 2065, 3245, 4036, 5540		Oysters, shell.....	1405	Pans, drip, with tanks.....	1155
Packing, carbondum.....		Pans, gem, cast-iron.....		Pans, ice.....	2715
Packing, excelsior.....		Pans, long, cast-iron.....		Pans, long, cast-iron.....	2715
Pans, adding machine, 1455, 3315, 3290, 3295		Pans, mining.....		Pans, mining.....	3765, 3766
Paper, blotting.....		Pans, sauce, cast-iron.....		Pans, settler.....	33, 5778 to 5792, incl.
Paper, bond.....		Pans, tire tube testing, galvanized iron.....		Pans, vacuum.....	2715
Paper, book.....		Paper, carbonium.....		Pans, wash.....	1270
Paper, building, asbestos, 2065, 4036, 5540		Paper, abrasive.....		Pans, wash, iron or steel.....	3755
Paper, building, 3305, 3525, 3302, 5112		Paper, adding machine, 1455, 3315, 3290, 3295		Pants, cotton.....	620, 2225
Paper, carbondum.....		Paper, blotting.....		Paper, abrasive.....	2580, 2686
Paper, cash registers, 1455, 3315, 3295, 3296		Paper, bond.....		Paper, adding machine, 1455, 3315, 3290, 3295	
Paper, cigarette.....		Paper, book.....		Paper, blotting.....	3290, 3345
Paper, cloth.....		Paper, building, asbestos, 2065, 4036, 5540		Paper, bond.....	3295, 3350
Paper, cloth.....		Paper, building, 3305, 3525, 3302, 5112		Paper, book.....	3295, 3345
Paper, check, for cash registers, 1455, 3315, 3295, 3296		Paper, carbondum.....		Paper, building, asbestos, 2065, 4036, 5540	
Paper, cloth.....		Paper, check, for cash registers, 1455, 3315, 3295, 3296		Paper, building, 3305, 3525, 3302, 5112	
Paper, cloth.....		Paper, cigarette.....		Paper, carbondum.....	2580
Paper, cloth.....		Paper, cloth.....		Paper, cigarette.....	1455, 3315, 3295, 3296



POINTS FROM WHICH RATES NAMED HEREIN APPLY—Continued

Rates Applicable

MISSOURI:

Adrian	Coburg	Granby	Lee's Summit	New Market	Rushville
Air Line Jct.	Coleman	Grandview	Liberal	Nishnabotna	Saginaw
Alba	Congo	Greenwood	Linden	Nodaway	St. Joseph
Amazonia	Corning	Gifton	Lisle	Noel	Scott's Coal
Amoret	Craig	Halls (Buchanan Co.)	Little Blue	Northern Jct.	Spur
Amory	(Holt Co.)		Lone Tree	North Kansas	Seneca
Amos	Crisp	Hallwood	Luckey's Coal	City	Sheffield
Amsterdam	Culverton	Hannan	Spur	North	Sheldon
Anderson	Cursors	Harbo	McCauley	Maywood	Smithfield
Archie	Dearborn	Harlem	Parke	Nyhart	Smithville
Ardsath (L. C. L. only)	Diamond	Harris	McCormick	Opolis	South Lee
Armour	Diamondville	(Vernon Co.)	Place	Ovid	Sprague
Arthur	Dodson	Harrisonville	McElhaney	Panama	Junction
Asbury	Doubling	Heims	Manchester	Oronogo	Stotesbury
Athol	Track (K. C. S. R'y)	Horton	Martin City	Oskaloosa	Sugar Creek
Atlas	Drexel	Hovey	Maywood	Panama	Junction
Avon (Cass Co.)	Duenweg	Huber	Merwin	Parkville	Swarts
Bean Lake	East	Iantha	Miller Bros.	Passaic	Tipton
Bee Creek	Leavenworth	Iatan	Milo	Peculiar	Ford
Benton	Elf	Idlewild Park	Minden	Pleasant Hill	U. S. Fish Hatchery
Benton Park	Elk Springs	Independence	Mo. M. & C.	Porto Rico	Vale
Beverly	Elm Park	Independent	Spur	Powder S. W.	Waco
Big Blue Jct.	Eve	Powder Spur	Mokan	Powell	Waldron
Bigelow	Fairmont	Irwin	Moundville	Prosperity	Wales
Blue Siding	Park	Jackson Spur	Mt. Washington	Purcell	Watson (Atchison Co.)
Boston	Farley	Jasper	ton	Quarry Track	Webb City
Bronaugh	Faucett	Jaudon	Mulberry	Raymore	West Belton
Broughton	Foley	Joplin	Murray	Raytown	West Line
Gravel Spur	Forbes	Kansas City	Napier	Red Bridge	Weston
Browns	Forest City	Kenn Moor	Nashua	Rex	West Platte
Butler	Fortescue	Killian's Coal	Nassau	Richards	Willey's Coal
Campbellton	Foster	Spur	Junction	Rich Hill	Spur
Carl Junction	Galesburg	Knoche	Neck City	Rinehart	Willow Brook
Carriertown	Spur	Junction	Neosho	Rock Creek	Winthrop
Carterville	Gashland	Lamar	(K. C. S. R'y)	Rock Quarry	Woodruff
Carthage	Goodman	Lanagan	Nevada	Rubber Neck	(Platte Co.)
Cecil	Gowdy	Langdon	New East	Rucker	Worland
Center Creek	Gower	Leeds	Leavenworth		

Group F Rates

ALL OTHER POINTS.

Group E Rates

NEBRASKA:

Albright	Dakota City	Jackson	Murray	Ranch Spur	Union
Arlington	De Bolt Place	Julian	Mynard	Richfield	Valley
Ashland	De Soto	Kennard	Nebraska City	Rosalie	Verdon
Auburn	Dunbar	Laketon	Nemaha City	Rulo	Wabash
Avery	Elberon	Lane	Nickerson	Rumsey	Walhill
Avoca	Elkhorn	La Platte	North	Schubert	Wann
Barney	Falls City	Leshara	Auburn	South Bend	Washington
Bellevue	Florence	Lorton	Oakland	South Omaha	Waterloo
Bennington	Fort Calhoun	Louisville	Olson	South Sioux	Weeping Water
Berlin	Fort Crook	Lyman Spur	Omaha	City	Winnebago
Blair	Fremont	Lyons	Oreapolis	Springfield	Winslow
Bracken	Gilmore	McCandless	Ouren	Stella	Woodcliff
Brook	Gilmore Jct.	Siding	Papillion	Strausville	Wood Park
Brownville	Glen Rock	Manley	Pappio	Syracuse	Wood Siding
Cedar Creek	Goodwin	Meadow	Paul	Talmage	Woodworth's
Chalco	Gretta	Melia	Peru	Tekamah	Spr.
Coburn	Herman	Mercer	Plattsmouth	Turlington	Wyoming
Comman	Horner	Millard	Portal	Tyson	Yutan
Craig	Howe	Minersville	Preston	Uheling	
Cullom	Irvington	Murdock	Ralston	Unadilla	

Group F Rates

ALSO

Any unnamed points on the following lines located east of points shown below, viz:

Chicago & Northwestern R'y—Fremont.

Chicago, Burlington & Quincy R. R.—Goodwin, Ashland, Unadilla, Auburn and Falls City.

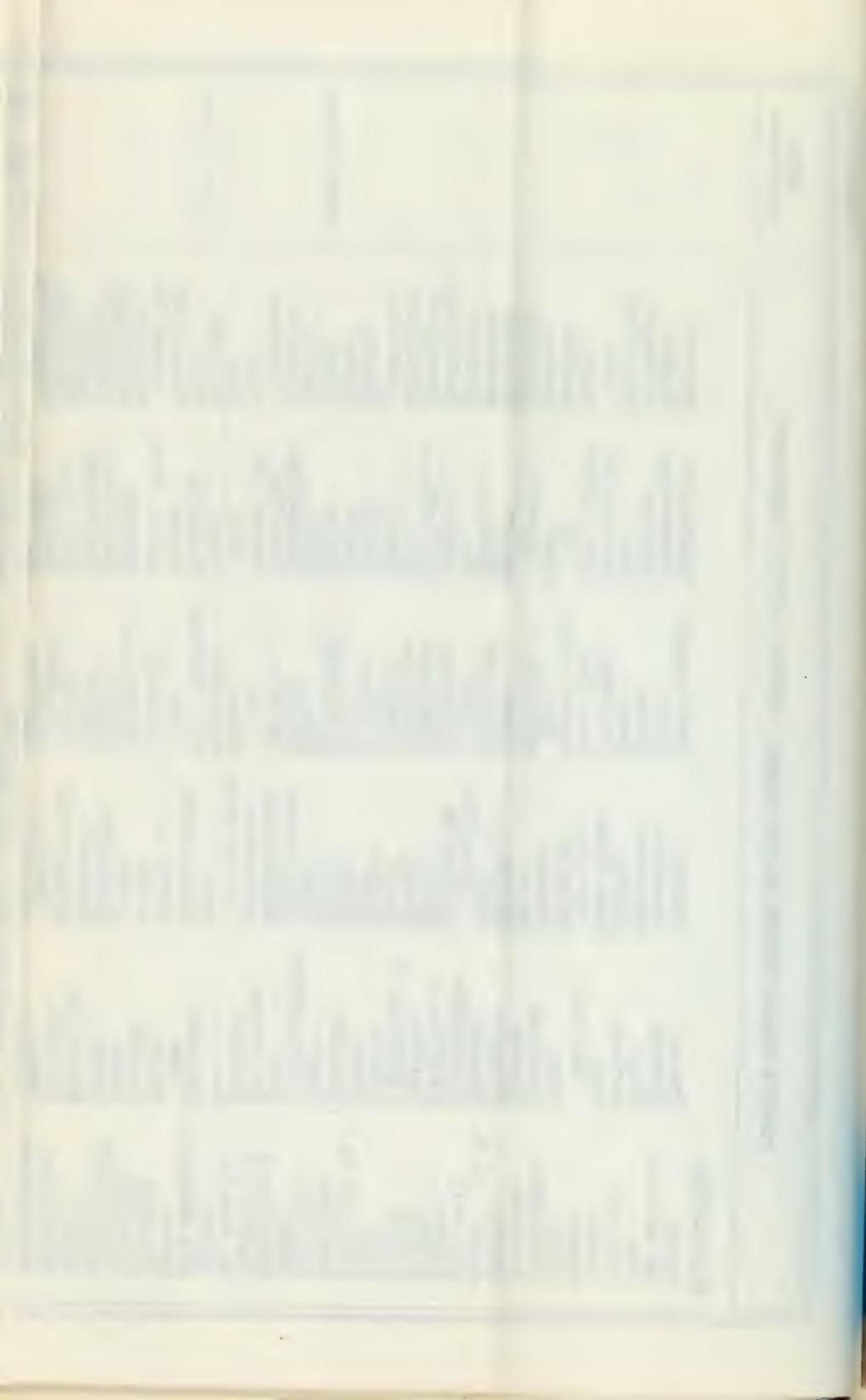
Chicago, Rock Island & Pacific R'y—Murdoch.

Chicago, St. Paul, Minneapolis & Omaha R'y—Jackson, Hubbard, Oakland.

Missouri Pacific R'y—Wabash, Talmage.

Union Pacific R. R.—Fremont, Yutan.

(CONCLUDED ON FOLLOWING PAGE.)



POINTS FROM WHICH RATES NAMED HEREIN APPLY—Continued

OKLAHOMA—Concluded:

						Rates Applicable
Caston	Foreman's	Indianola	Milton	Pryor	Stigler	
Catalai	Spur	Inola	Mohawk	Quapaw	Stillwell	
Catoosa	Forney	Jackson	Monroe	Quinton	Stone Bluff	
Chambers	Fort Gibson	Switch	Muldrow	Ramon	Stonebraker	
Checotah	Fort Towson	Jenks	Murphy	R. B. Choate	Strang	
Chelsea	Foyil	Johnsville	Muskogee	Reams	Summit	
Cherr Creek	Frink	Joneston	Narcissa	Red Bird	Superior	
Chert Ballast	Gaither	©Kanima	Neha	Redlands	Swink	
Pit	Gans	Karrie	Nirine	Red Oak	Taft	
Choctie	Gap	Keba	N. McAlester	Reid's Spur	Talala	
Chouteau	Garnett	Keefeton	N. Muskogee	Rentiesville	Thomasville	
Claremore	Garvin	Kelso	Noxil	Reynolds	Tiawah	
Coal Creek	Gasopolis	Kendall	Oak-ta-ha	Rogers (Mayes Co.)	Todd	
Coal Spur	Gibson	Ketchum	Ochelata	Rice	Traber	
Coatton	Glenpool	Kinta	©O'Farrell	Roby	Tullahassee	
Collinsville	Golden	Kiowa	Ogeechee	Rock Island	Tulsa	
Copan	Gore	Krebs	Okmulgee	Ross City	Tulley	
©Cornell	Gowan	Kuss	Onapa	©Rotary	©Tyrell	
Council Hill	Gravel Spur	Lefebre	Passing Spur	Rowland	Unger	
Coweta	Greenwood	Leliaetta	Patterson	Russell Creek	Upson	
Craig	Jct.	Lenapah	Peavine Lum-	Savanna	Valliant	
Crekola	Gulftown	Leonard	ber Spur	Seaman	Vera	
Creo	Hailey	Lequire	Peno	Sequoyah	Verdigris	
Crowder	Haileyville	Limestone	Pensacola	Shady Point	Vian	
©Culp	Hamilton	Lincolntown	Perry	Shaft 3	Vinita	
Dawes	Hanna	Locust Grove	Panama	Shaft 7	Wagoner	
Dawson	Hanson	Log Spur	Passing Spur	Sand Springs ✓	Wainwright	
Delaware	Hartshowe	Lopp	Spur	Sans Blois	Wann	
Denman	Haskell	Lowerre	Peavine Lum-	Schulter	Warner	
Dewar	Hanto	Lutil	ber Spur	Seaman	Watkins	
Dewey	Haworth	Lyon	Peno	Sequoyah	Watova	
Dow	Hay Ranch	McAlester	Pensacola	Shady Point	Watts	
Durrall	Henryetta	McCurtaim	Perry	Shaft 3	Welch	
Edgar	Heavener	McDonald	Petroleum	Shaft 7	Wells	
Eufauls	Hichita	Mackey	Pinola	Shopton	Westville	
Eureka Coal Co. Spur	Hodgens	©McKay	Pittsburg	Siebold	White Oak	
Fairland	Hoffman	Macon	Poag	Skilatook	Wilburton	
Falls City	Houston	Marble City	Polson	Slope	Williams	
Fenshaw	Howard Lum-	Marble Quarry	Port	Son	Windsor	
Fascine	ber Co. Spur	Howden	Massey	Soper	Wirth	
Featherston	Howe	Matoaka	Matoaka	So. Coffeyville	Wister	
Ferguson Cont. Co. Spur	Hughes	Mazil	Mazil	Sperry	Wyandotte	
Flint Siding	Hulwe	Mekke	(Wayne Co.)	Spiro	Wybark	
Flush	Huntley	Miami	Forum	Potter	Yahola	
Fogels Spur	Idabell	Millerton	Potter	Sputter	Yonkers	
			Poteau	Stevens		

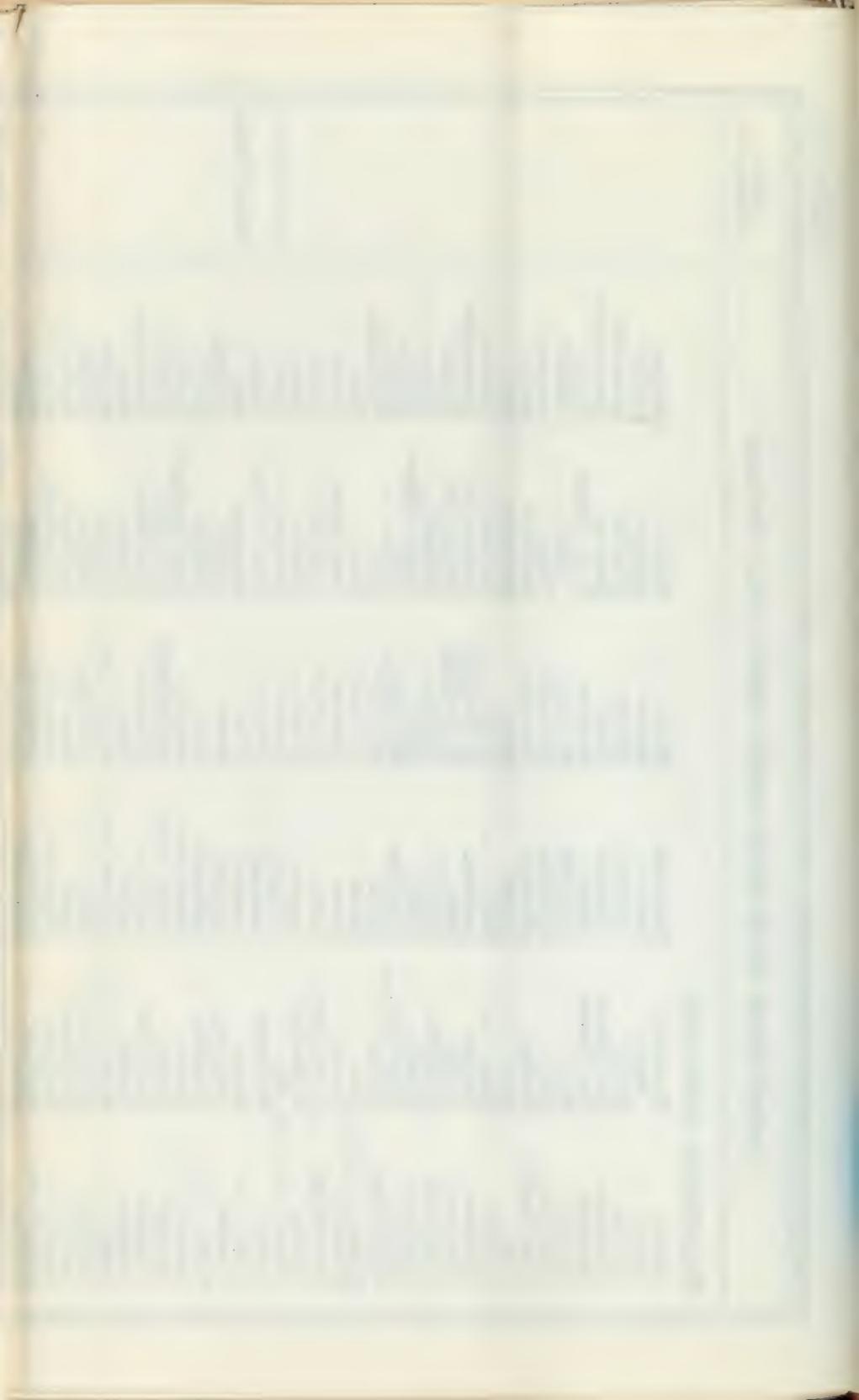
ALL OTHER POINTS

Group H Rates

PENNSYLVANIA:

Acheson	Anderson Road	Baird	Beaver Road	Blackburn	Branchton	
Adamsville	Annandale	Bagdad	Becks Run	Blacks Run	Brandon	
Aiken	Apollo	Bagdad	Beechmont	Blackstone	(Venango Co.)	
(Allegheny Co.)	Ardena	Colliery	Belle Bridge	Mine	Brevard	
Akeley	Argentine	Baggaley	Belle Vernon	Blythedale	Bridgeville	
Aladdin	Argyle	Bakerstown	Belle Vernon	Bonnie Brook	Bridgewater	
Albion	Arnold (West-	Bamford	Belle Vernon	(Butler Co.)	(Beaver Co.)	
Aliquippa	moreland Co.)	(Washington	Bellefonte	Borland	Brightwood	
Allegheny		Co.)	Ben Avon	Boston	Brilliant	
Allenport	Arona	Banksville	Bennett	Boughton	Brinker	
Allison Park	Arsipwall	Banksville Jct.	Bentleyville	Bouquet	Briquette	
Allsworth	Astral	Barking	Bessemer	Bovard	Browns	
Alpsville	Atlantic	Barnes Cross-	Best Siding	Bower Hill	(Allegheny Co.)	
Alton	Atwells Cross-	ing	Biddle	Boyce	Brownsdale	
(McKean Co.)	Bartley	Baum	Big Ben	Boyer	Brownsville	
Amasa	Avalon	Beading	Big Shanty	(McKean Co.)	Road	
(Mercer Co.)	Avelia	Beans Hill	Bingham	Brackinridge	Bruceton	
Ambridge	Avonmore	Bear Lake	(Allegheny Co.)	Bradford	Bruin	
Anderson	(Westmore-	Beatty	Birmingham	Braeburn	Bryant	
(Washington Co.)	land Co.)	Beaver	(Allegheny Co.)	Branch	Buchanan	
Anderson Jct.	Baden	Beaver Falls	Bishop	(Mercer Co.)	(Crawford Co.)	

(CONTINUED ON FOLLOWING PAGE.)



POINTS FROM WHICH RATES NAMED HEREIN APPLY—Continued

Rates Applicable

TEXAS—(See Note 1, page 20 and Notes 2 and 3, page 21)—Concluded:

Pelican	Red Lawn	Salt City	Stayton	Tiptop	Weldon
Pennell	Redwater	Saltillo	Steep Creek	Todd	Wells
Perato	Reese	San Augustine	Stella	Tomball	Wells Creek
Percival	Rector	Sand	Stewart	Trabue	Wenasco
Petty	Rekaw	Sand Pit	Stilson	Tranwellis	Westbank
Phelps	Rena	Sand Spur	Stinchcomb	Trata	Westcott
Pickens Spur	Reno	Sandy Point	Stockard	Trawick	Westfield
©Pickering	Renova	Saratoga	Stockman	Treadway	West La Porte
Siding	Retrieve	Sarber	Stoneham	Trebla	West Living- ston
Pickton	Reynolds	Saron	Storage	Trinity	West Marshall
Pine	Rhöneboro	Sartaria	Stowell	Troup	West Orange
Pinehurst	Rice	Satsuma	Strang	Trukton	West Port
Pine Island	Rice Farm	Schluter	Streets Spur	Tubbe	Arthur
Pineland	Richards	Scroggins	Strickland	Tucker	Westville
Pine Ridge	Richmond	Sea Breeze	Stryker	Tulane	Wetzel
Pinery	Ridgeway	Seabrook	Suffolk	Turney	White City
Pineview	Rigney	Seabun	Sugarland	Tyler	Whitehouse
Pinnacle	Ripley	Sebastopol	©Sugarland	Ulmer	White Oak
Pittsburg	Riverside	Section 3	Connection	Urbana	Whites Ranch
Plantersville	Roans Prairie	Section 4	Sugar Valley	Valda	Wholey
Platt	Roarks	Section 5	Sulphur	Van Vleck	Whotley
Pledger	Roberts Spur	Security	Sulphur	Veals	Wicks
Pocahontas	Robertson	Seneca	Springs	Venable	Wilburn
Podo	Spur	Sequoyah	Swan	Venture	Wildhurst
Poe	Rockland	Seven Oaks	Swanson	Verde	Wilkins
Point	Roganville	Shawnee	Sweeney	Vidor	Willard
Pollock	Rogers	Shelby Jct.	Swenson	Village Creek	Williams
Pomona	Rogers Spur	Shelldon	Swinford	Village Mills	Willingham
Ponta	Rollover	Shell Siding	Tabor	Vina	Wills
Port Arthur	Romayer	Shepherd	Talco	Virgil	Willow
Port Bolivar	Rosedale	Sherwin	Tally	Virginia Point	Willow Springs
Port Naches	Rosenberg	Shipmore	Tamina	Viterbo	Willsons Mill
Potomac	Rosenberg Jct.	Shiro	Tandy	Votaw	Wills Point
Powderly	Rosenburg	Siam	Tates	Voth	Wilsons
Powell's Spur	Rosewood	Sibby	Tatum	©Wadsworth	Wilsons Spur
Poynor	Rossharon	Siddall	Teco	©Wakefield	Windom
Prairie View	Rosslyn	Signor	Telmah	Walden	Winfield
Press	Rotherwood	Silas	Tenaha	Waller	Winnie
Prestridge	Round Lake	Silsbee	Terminal Jct.	Wally	Winona
Prices	Rowan	Silver Lake	Terry	Walsh	Winsboro
Pritchett	Rowansville	Simms	Tewera	Wanda	Wofford
Queen City	Roxton	©Sims	Texas City	Warren	Woodall
Quigley	Rugby	Simonton	Texas City	Warsaw	Woodard
Quinn	Rugley	Singleton	Texas City	Watkom	Woodlawn
Ragland	Rulif	Smith	Texas City	Watlesky	©Woodnery
Randin	©Rush	Smith's Spur	Terminal	Waterman	Woodville
Ratcliff	Rusk	Sour Lake	©Connection	Watson Jct.	Wootters
Rayburn	Ruth	Spencer Spur	Texla	Watson	Yarbore
Rayford	Rye	Spindle Top	Thedford	Waukegon	Yells
Raymers	©Rymers	Splendora	Thicket	Wayne	Yelwoc
Switch	Switch	Spring	Thompson	Weaver	Youens
Raywood	Sabine	Springdale	Timbers	Webster	Young
Rebecca	Sabine Pass	Stafford	Stalls	Weeden Spur	Zavalia
Red Branch	Sabine River	Stamps	Stamp	Weiss	©Zelrath
Reddick	Sacul	State Crossing	Timpson		
Redfield	Salmon				

Group F Rates

Bravo	Federal	Matlock	Perico	©Romero	Tobin
Corleona	Fort Bliss	Middlewater	Perico	Texline	Ware
Dalhart	Material Yard	Pancho	©Rhn		

Group J Rates

†In connection with Southern Pacific Co. or El Paso & Southwestern System rates will only apply on traffic interchanged at El Paso, Texas, or Tucson, Ariz.

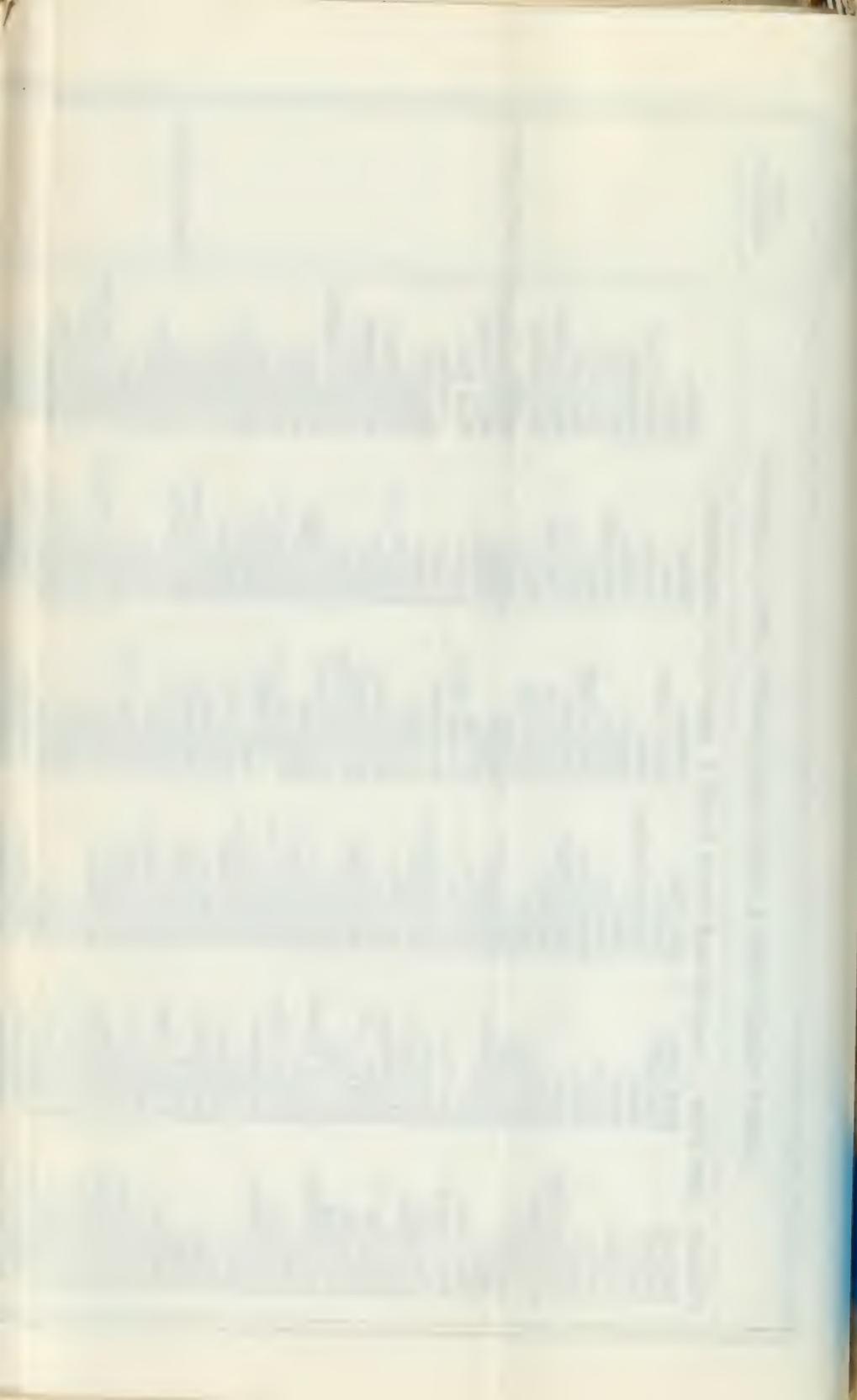
ALL OTHER POINTS EXCEPT THOSE NAMED (IN ITALICS) BELOW.....

Group H Rates

EXCEPTIONS.

Combination rates will apply from points shown below, and unnamed points located directly between on the same line of railroad.

Barreda	Combes	Kingsville	Mifflin Stock	Ricardo	Spohn
Bishop	Donna	La Feria	Pens	Riviera	Tiucano
Birby	Driscoll	Llano Grande	Mission	Rudolph	Turcotte
Brownsville	Ebenezer	Lujard	Montoya	Sam Fordyce	Vinton
Caesar	Edinburg	McAllen	Norias	San Benito	West McAllen
Canutillo	El Paso	Mamie	Olmilo	San Juan	White Spur
Chihuahua	Hartlingen	Mercedes	Pharr	Sarita	Yturria
Closner	Katherine	Mifflin	Raymondville	Sebastian	



POINTS TO WHICH RATES NAMED HEREIN APPLY—Continued.

LIST OF STATIONS IN

ARIZONA, CALIFORNIA, MEXICO, NEVADA, NEW MEXICO, OREGON AND UTAH—Continued.

NOTE.—For List of Stations to which Special Commodity Rates, Sections 4 and 5, apply, see pages 57 to 61, inclusive.

STATIONS	DELIVERING LINES	RATES APPLICABLE			NOTE (See page 67)	WESTERN GATEWAYS (For Key to Numbers see pages 62, 63, 64 and 65)		
		CLASS (See pages 37 to 157, inclusive) INDEX No.	COMMODITY RATE BASES					
			Sect. 2	Sect. 3				
Cadanassa	Cal.	S. P.	472	1	Note 1	1		
Cadwell	Cal.	P. & S. R.	296	1	Note 1	1		
Calabasas	Ariz.	S. P.	490	2	3	45A		
Calais	Cal.	S. P.	472	1	Note 1	1		
Calixto	Cal.	E. P. & S. W.	215	2	3	68		
Caliente	Nev.	L. A. & S. L.		2	3	43		
Calipatria	Cal.	S. P.	472	1	Note 1	1		
Calistoga	Cal.	S. P.	472	1	Note 1	1		
Calineva	Cal.	W. P.	633	1	3	50, 51, 52		
Calor	Ore.	S. P.	472	Note 2	Note 2	2		
Calpella	Cal.	N. W. P.	276		Note 1	1		
Cal. Powder Works	Cal.	S. P.	472	1	Note 1	1		
Calva	Ariz.	A. E.	26	Note 1	Note 1	1		
Calvada	Nev.	S. P.	428		2	3		
Cambray	N. M.	S. P.		2	3	45A		
Camino	Cal.	N. E.	265	1	Note 1	1		
Campbell	Cal.	Pen. R'y	293	1	Note 1	1		
Campbell	Cal.	S. P.	472	1	Note 1	1		
Camp Meeker	Cal.	N. W. P.	276	1	Note 1	1		
Campo	Ariz.	A. E.	59	2	3	62		
Camp Pistolesi	Cal.	N. W. P.	276	1	Note 1	1		
Camp Taylor	Cal.	N. W. P.	276	1	Note 1	1		
Canca	Cal.	S. P.	472	1	Note 1	1		
Cananea (Sonora)	Mex.	S. P. R. R. of M.		2	3	68		
Canet	Cal.	S. P.	472	1	Note 1	1		
Canoe	Ariz.	S. P.	499	2	3	45A		
Canon	Nev.	L. V. & T.	236	Note 1	Note 1	1		
Cantara	Cal.	S. P.	472		Note 1	1		
Canyon Diablo	Ariz.	A. T. & S. F.		2	3	1A		
Capay	Cal.	S. P.	472	1	Note 1	1		
Capitolia	Cal.	S. P.	472	1	Note 1	1		
Capitol Ave	Cal.	Pen. R'y	293	1	Note 1	1		
Caporn	Cal.	S. P.	470	1	3	53		
Carbondale	Cal.	S. P.	472	1	Note 1	1		
Carlton	Nev.	S. P.	401	2	3	44		
Carlton	Nev.	W. P.	596	2	3	51		
Carne	N. M.	S. P.		2	3	45A		
Carmelos	Cal.	S. P.	472	1	Note 1	1		
Carrara	Nev.	L. V. & T.	238	Note 1	Note 1	1		
Carrara	Nev.	T. & T.	545		Note 1	1		
Carrizo	Ariz.	A. T. & S. F.		2	3	1A		
Casaha	Ariz.	A. E.	81	Note 1	Note 1	1		
Casa Grande	Ariz.	S. P.	508		3	62		
Cashion	Ariz.	A. E.	61	Note 1	Note 1	1		
Cashmere	Cal.	S. P.	472		Note 1	1		
Casini	Cal.	N. W. P.	276	1	44, 45, 46, 47, 49			
Castella	Cal.	S. P.	472	1	Note 1	1		
Castle Crag	Cal.	S. P.	472	1	Note 1	1		
Castle Rock	Cal.	S. P.	472	1	Note 1	1		
Catalina	Ariz.	E. P. & S. W.	269	2	3	68		
Cavot	Ariz.	S. P.		2	3	45A		
Cazadero	Cal.	N. W. P.	276	1	Note 1	1		
Cecil Jet	Utah	S. P.		2		44		
Cedar	Nev.	S. P.	393	2	3	44		
Cedar Glade	Ariz.	A. T. & S. F.	155	Note 1	2	3		
Central	Ariz.	A. E.	16		3	1A		
Central Mine	Cal.	S. P.	472	1	Note 1	1		
Cerritos Oil Spur	Cal.	L. A. & S. L.	311	1	3	44, 45, 46, 47, 49		
Cesaro	Cal.	S. P.	472	1	Note 1	1		
Chalender	Ariz.	A. T. & S. F.		2		44		
Chambers	Ariz.	A. T. & S. F.		2	3	1A		
Chamiso	Ariz.	S. P.		2	3	45A		
Champion	Cal.	S. P.	444	1	3	44		
Chandler	Ariz.	A. E.	78	Note 1	Note 1	1		
Chandler	Cal.	S. P.	472		2	3		
Chappel	N. M.	S. P.		2	3	45A		
Chappo	Cal.	A. T. & S. F.	151	1	Note 1	1		
Charleston	Ariz.	E. P. & S. W.	201	2		68		
Charleston	Nev.	L. V. & T.	234	Note 1	Note 1	1		
Chaves	Ariz.	S. P.	501		3	69		
						45A		



POINTS TO WHICH RATES NAMED HEREIN APPLY—Continued.

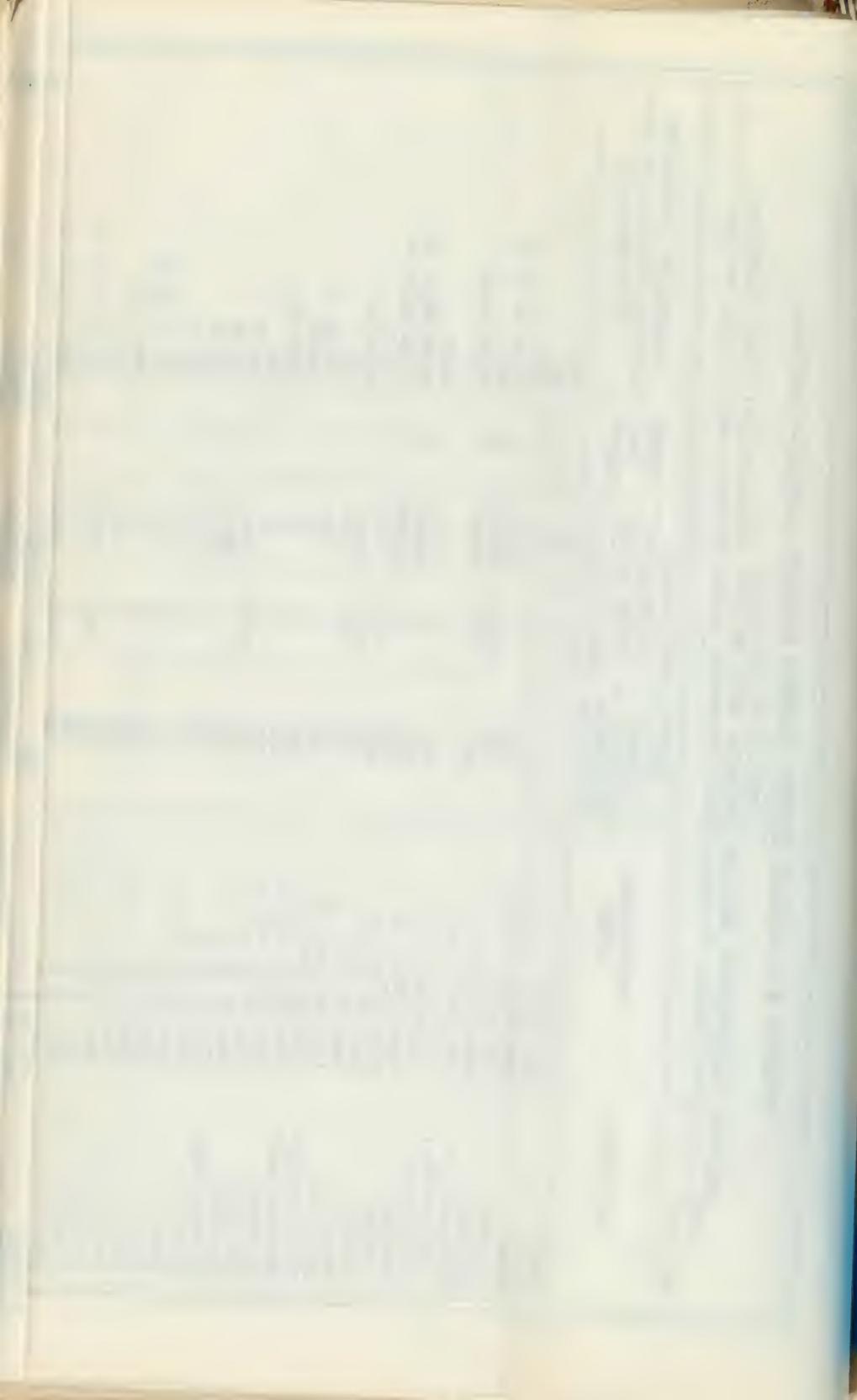
LIST OF STATIONS IN

ARIZONA, CALIFORNIA, MEXICO, NEVADA, NEW MEXICO, OREGON AND UTAH—Continued.

NOTE.—For List of Stations to which Special Commodity Rates, Sections 4 and 5, apply, see pages 57 to 61, inclusive.

STATIONS	DELIVERING LINES	RATES APPLICABLE			NOTE (See page 67)	WESTERN GATEWAYS (For Key to Numbers see pages 62, 63, 64 and 65)		
		CLASS (See pages 97 to 137, inclusive) INDEX NO.	COMMODITY RATE BASES					
			Sect. 2	Sect. 3				
Rankin.....	Ariz. S. P.		2	3		45A		
Rasid.....	Nev. S. P.		2	3		44		
Raso.....	Ariz. S. P.		2	3		45A		
Rawson.....	Cal. S. P.	472	1	Note 1	1	44, 45, 46, 47, 49		
Ray Jct.....	Ariz. A. E.	88	Note 1	Note 1	1	62		
Raymond.....	Cal. S. P.	472	1	Note 1	1	44, 45, 46, 47		
(Madera Co.)								
Reclamation.....	Cal. N. W. P.	276	1	Note 1	1	58, 59		
Red Bluff.....	Cal. S. P.	472	1	Note 1	1	44, 45, 46, 47, 49		
Redding.....	Cal. S. P.	472	1	Note 1	1	44, 45, 46, 47, 49		
Redhouse.....	Nev. W. P.	605	2	3		51		
Redlich.....	Nev. T. & G.	526	Note 1	Note 1	1	80, 81, 82		
Redo.....	Cal. A. T. & S. F.	①	①	①		①		
Redondo Beach.....	Cal. A. T. & S. F.	122	1	3		1, 2, 5		
Redondo Beach.....	Cal. P. E.	289	1	3		39, 40		
Red Rock.....	Ariz. S. P.	605	2	3		45A, 45B		
Red Rock.....	Cal. W. P.	639	1	3		51		
Red Rock.....	Nev. B. G.	552	Note 1	Note 1	1	66, 67		
Redwood Valley.....	Cal. N. W. P.	276	1	Note 1	1	58, 59		
Reed.....	Cal. N. W. P.	276	1	Note 1	1	58, 59		
Rees.....	Ariz. A. T. & S. F.		①	①		①		
Reese.....	Utah S. P.		2	3		44		
Reno.....	Nev. W. P.	645	2	3		51		
Reno.....	Nev. S. P.	422	2	3		44		
Rennox.....	Nev. W. P.	603	2	3		51		
Reppy.....	Ariz. A. E.	31	Note 1	Note 1	1	62		
Reynard.....	Nev. W. P.	626	2	3		51		
Rice.....	Ariz. A. E.	30	Note 1	Note 1	1	62		
Richfield.....	Cal. S. P.	472	1	Note 1	1	44, 45, 46, 47, 49		
Richland.....	Cal. A. T. & S. F.	151	1	Note 1	1	1, 2, 5		
Richvale.....	Cal. S. P.	472	1	Note 1	1	44, 45, 46, 47, 49		
Ridgewood.....	Cal. N. W. P.	276	1	Note 1	1	58, 59		
Rillito.....	Ariz. S. P.		2	3		45A, 45B		
Rincon.....	Cal. S. P.	472	1	Note 1	1	44, 45, 46, 47		
Rio Bravo.....	Cal. S. P.	472	1	Note 1	1	44, 45, 46, 47		
Rio Campo.....	Cal. N. W. P.	276	1	Note 1	1	58, 59		
Rio Grande.....	N. M. S. P.		2	3		45A		
Rionido.....	Cal. N. W. P.	276	1	Note 1	1	58, 59		
Rio Puerco.....	N. M. A. T. & S. F.	125	2	3		1A		
Riordan.....	Ariz. A. T. & S. F.		2	3		1A		
Rita.....	Ariz. E. P. & S. W.	213	2	3		68		
Rito.....	N. M. A. T. & S. F.		2	3		1A		
Riverbank.....	Cal. S. & W.	300	1	Note 1	1	24, 25, 26		
Riverside.....	Ariz. A. E.	89	Note 1	Note 1	1	62		
Roach.....	Nev. L. A. & S. L.	322	2	3		43		
Roberts.....	N. M. A. & N. M.	102	Note 1	Note 1	1	60, 61		
Robinson.....	Cal. P. & S. R.	296	1	Note 1	1	40A, 40B		
Robial.....	Cal. P. & S. R.	296	1	Note 1	1	40A, 40B		
Rock Butte.....	Ariz. A. T. & S. F.		2	3		1A		
Rock Crusher.....	Ariz. A. T. & S. F.		①	①		①		
Rock Hill.....	Nev. T. & G.	527	Note 1	Note 1	1	80, 81, 82		
Rockwood.....	Cal. S. P.	472	1	Note 1	1	45		
Rodeo.....	N. M. E. P. & S. W.	184	2	3		68		
Rogers.....	Cal. Pen. R. Y.	293	1	Note 1	1	63		
Ronda.....	Cal. S. P.	472	1	Note 1	1	44, 45, 46, 47, 49		
Ronda.....	Nev. W. P.	619	2	3		51		
Rose Creek.....	Nev. S. P.	408	2	3		44		
Rose Orchard.....	Cal. S. & W.	300	1	Note 1	1	24, 25, 26		
Rosewell.....	Nev. L. V. & T.	237	Note 1	Note 1	1	69		
Rosy.....	Nev. S. P.		2	3		44		
Ross.....	Cal. N. W. P.	276	1	Note 1	1	58, 59		
Ross.....	Cal. P. & S. R.	296	1	Note 1	1	40A, 40B		
Rossi.....	Cal. S. P.	472	1	Note 1	1	44, 45, 46, 47		
Routier.....	Cal. S. P.	472	1	Note 1	1	44, 45, 46, 47, 49		
Rowena.....	Cal. N. E. (M. & C. Br.)	266	1	Note 1	1	21, 22, 23		
Rowes.....	Cal. N. W. P.	276	1	Note 1	1	58, 59		
Roy.....	Cal. A. T. & S. F.	151	1	Note 1	1	1		
Roys.....	Cal. N. W. P.	276	1	Note 1	1	58, 59		
Rozel.....	Utah S. P.	343	2	3		44A		
Ruby.....	Nev. W. P.	584	2	3		51		
Rumsey.....	Cal. S. P.	472	1	Note 1	1	44, 45, 46, 47, 49		
Russian River Heights.....	Cal. N. W. P.	276	1	Note 1	1	58, 59		

©Effective April 15, 1918. ELIMINATE. Station abandoned. See Note C on title page.



APPLICATION OF RATES—Continued.

ALTERNATIVE APPLICATION OF COMBINATION RATES.

ITEM No. 26.

COMBINATION RATES.

▲(a) (Expires with close of business October 31, 1918, unless sooner canceled, changed or extended). This tariff (supplements thereto and reissues thereof), having been issued in compliance with Commissions' amended Fourth Section Order No. 6790 of date June 30, 1917, and the carriers having been unable, owing to the wide scope of territory covered, to publish the combinations of rates which make less than the through rates provided in the tariff (or as amended), the Commission has authorized the following alternative rate provisions (b).

▲(b) (Expires with close of business October 31, 1918, unless sooner canceled, changed or extended). If the aggregate of intermediate rates via route over which shipment moves, wherever found, makes less than the through rates provided in this tariff (or as amended), the combination rates so made will apply.

ITEM No. 27.

The "Class Arbitrary" shown in rate items in Section 3 of this tariff, designates the class to be used in applying the Class Arbitrations, named in Trans-Continental Freight Bureau Arbitrary Circular No. 69-A (I. C. C. Nos. 21, 599 and 1026 of C. C. McCain, Agent, Eugene Morris, Agent, and R. H. Countiss, Agent, respectively), and Trans-Continental Freight Bureau Arbitrary Circular No. 61-A (I. C. C. Nos. 23, 619 and 1028 of C. C. McCain, Agent, Eugene Morris, Agent, and R. H. Countiss, Agent, respectively), only on carload shipments of two or more articles for which no mixed carload arbitrary is provided in said Circulars Nos. 69-A and 61-A for use in connection with "Rate Basis 3" rates, as shown in Section 3 of this tariff.

ITEM No. 28.

RATES ON IMPORT TRAFFIC.

(Via Atlantic Ports.)

The rates named in this tariff from points taking Group A rates, will apply from Atlantic ports of entry (i. e. Baltimore, Md., Boston, Mass., Newport News, Va., Philadelphia, Pa., Portland, Me., Montreal, Quebec, Que., St. John, West St. John, N. B., Halifax, N. S., and New York, N. Y.), on shipments originating in Europe (or beyond), destined to points taking "Rate Basis 1," "Rate Basis 2" or "Rate Basis 3" rates (or beyond).

(Via Gulf of Mexico Ports.)

(a) On traffic originating in foreign countries and destined to points covered by this tariff, or beyond, the rates named herein as applying from Galveston, Tex., will apply also from shipside at Galveston, Port Arthur, Port Bolivar, Texas City, Tex., Algiers, Gretna, New Orleans and Westwego, La.

(b) The initial rail carriers parties to this tariff will advance to ocean steamship lines their transportation charges; also any other legitimate charges incident to the transportation of the property up to the port of import into the United States.

When such charges are advanced, the amount of such advance charges must be shown separately on waybills and freight bills, with the name of the ocean carriers to which the charges are advanced, and the inland tariff rate and charges of the rail carriers must also be shown in separate item.

ITEM No. 29.

RATES ON EXPORT TRAFFIC.

(Via Pacific Ports.)

Except as otherwise provided in Trans-Continental Freight Bureau Tariff No. 22-H (I. C. C. No. 1039 of R. H. Countiss, Agent), supplements thereto or reissues thereof or Trans-Continental Freight Bureau Tariff No. 20-F (I. C. C. No. 1022 of R. H. Countiss, Agent), supplements thereto or reissues thereof—

(a) In the absence of export rates to San Francisco, Cal., shipments destined to and consigned through to points in Asia, Philippine Islands, Australia, New Zealand, Fiji Islands, or beyond, will take to San Francisco, Cal., the rates named herein to San Francisco, Cal.

(b) Rates as authorized in paragraph (a) will apply to shipside at the wharves at San Francisco, Cal., served by the tracks of the terminal rail carriers, parties hereto, as well as to the stations of said terminal rail carriers at San Francisco, Cal.

(c) Carload rates will apply on shipments from one consignor aggregating not less than the specified carload minimum weight forwarded at one time to San Francisco, Cal., when such shipments are consigned to one or more persons at one or more destinations in Asia, Philippine Islands, Australia, New Zealand, Fiji Islands, or beyond. The minimum charge for each separate bill of lading issued will be the minimum charge published to San Francisco, Cal., plus steamer minimum charge from San Francisco, Cal., to destination.

ITEM No. 30.

RATES APPLYING TO SAN FRANCISCO, CAL., ON TRAFFIC DESTINED AND CONSIGNDED THROUGH TO ALASKA AND POINTS LOCATED ON OR TRIBUTARY TO YUKON RIVER AND TO HAWAIIAN ISLANDS.

On traffic destined to and consigned through to Alaska and points located on or tributary to Yukon River and to Hawaiian Islands, the rates thereon to San Francisco, Cal., will be governed by the following:

(a) The rates applying to Seattle, Wash., as published in Trans-Continental Freight Bureau West-Bound Tariff No. 4-O (I. C. C. Nos. 31, 683 and 1049, of C. C. McCain, Agent, Eugene Morris, Agent, and R. H. Countiss, Agent, respectively), supplements thereto or reissues thereof, will also apply to San Francisco, Cal., unless lower rates are named in this tariff to San Francisco, Cal.

(b) Rates as authorized in paragraph (a) will apply to shipside at the wharves at San Francisco, Cal., served by the tracks of the terminal rail carriers, parties hereto, as well as to the stations of said terminal rail carriers at San Francisco, Cal.

▲Issued under authority of Interstate Commerce Commission Order of September 19, 1917.



SECTION 3—COMMODITY RATES—Continued.

(TARIFF 1-Q)

Item No.	ARTICLES	C. L. or L. C. L. as indicated	RATES IN CENTS PER 100 POUNDS (Except as noted)		
			FROM	TO	Class Arbitr ary
			Points shown on pages 2 to 25, inclusive, as taking the following Group Rates	Points shown on pages 28 to 56, inclusive, as taking	
		Min. C. L. wt. (Pounds)	RATE BASIS 3	See Item 27	
	OILS, viz.—Concluded:				
3230	Oil, linseed, In bulk in barrels, or in tank cars, weight per gallon 7.8 lbs. NOTE.—With shipments in wood 2,000 lbs. of Hay, Straw, Sawdust or Tan Bark may be shipped free. ♦For Explanation, see page 66. ●For Explanation, see page 66.	C. L. In barrels, 45,000	A B C D	\$110 \$100 •95 •90	
		In tank cars, see Rule 11.	E F G H J	•90 85 85 85 85	
3235	Oil, lubricating, N. O. S., in glass or earthenware packed in boxes, in metal cans completely jacketed or in metal cans in crates.	C. L. 40,000	A B C D E F G H J	155 145 140 135 130 120 120 120 120	
3240	Oil, petroleum and its products, classified fifth class under heading of "Petroleum or Petroleum Products, including compounded Oils or Greases having a Petroleum Base" (exclusive of Sewing Machine and Cycle Oils), in current Western Classification, subject to rules, weights per gallon and minimum weights thereof. NOTE.—Rates named will apply also on Lubricating Compounds having a petroleum base and mixed with hair, waste or yarn. The Southern Pacific Company—Atlantic Steamship Lines (Morgan Line), Mallory Steamship Co., Old Colony Steamship Co., will not accept shipments of Paraffine Wax, in bulk, Beeswax, Glycerine, Naphtha and Kerosene Oil, in barrels. ♦For Explanation, see page 66. ●For Explanation, see page 66.	C. L. As per current Western Classification.	A B C D E F G H J	\$125 \$115 •110 •105 •100 90 90 90 90	
3245	PACKING, viz.: Asbestos, in rope or wick form, in bales or burlapped coils, Cushion, excelsior, grass, hay, or straw, in bales or burlapped bundles, Fibre, aluminum, in bundles, Hemp, in bundles, Jute, in bundles, Mats, excelsior, grass, hay or straw, in bales or burlapped bundles. ♦For Explanation, see page 66.	L. C. L.	A B C D E F G H J	•205 •190 •190 •175 175 175 175 175 175	
3250	Cushion, excelsior, grass, hay or straw, in bundles, not burlapped, Flax, in bundles, Mats, excelsior, grass, hay or straw, in bundles, not burlapped, Metallic, in bundles (See Note), Raw Hide, in bundles, Soapstone, in bundles. NOTE.—Will not apply on Metal Packing Rings. ♦For Explanation, see page 66.	L. C. L.	A B C D E F G H J	•227 •212 •212 •197 197 176 175 175 175	
3255	PACKING HOUSE PRODUCTS, viz.: Lard and Lard Substitutes, in water-proofed paper packages, glass or earthenware, packed in boxes; in tubs, buckets or jacketed cans; in cans or in tin pails, crated; in barrels, galvanized iron tanks or drums, Oil, cotton seed cooking, in glass, earthenware or metal cans, packed in boxes; in bulk in barrels. NOTE.—Shipments of Lard and Lard Substitutes consigned to points in Mexico through Douglas or Naco, Ariz., will be accepted when in metal cans, loose, at the rates provided on shipments in boxes or crates.	C. L. 30,000	A B C D E F G H J	•160 •160 •145 •140 •135 125 125 125 125	

A Denotes advance.

Rates and charges named in this supplement are not subject to increases shown in Special Supplement No. 6.

SPECIAL SUPPLEMENT No. 10

(Supplements Nos. 5, §6, 9 and §10 contain all changes from the original tariff that are effective on the date hereof)
Special Supplement.

C. R. C. No. 30 of C. C. McCain, Agent
C. R. C. No. 571 of Eugene Morris, Agent
C. R. C. No. 380 of R. H. Countiss, Agent

— TO —

I. C. C. No. 30 of C. C. McCain, Agent
I. C. C. No. 682 of Eugene Morris, Agent
I. C. C. No. 1048 of R. H. Countiss, Agent

UNITED STATES RAILROAD ADMINISTRATION

W. G. McAdoo, Director General of Railroads

TRANS-CONTINENTAL FREIGHT BUREAU

SPECIAL SUPPLEMENT No. 10

(Supplements Nos. 5, §6, 9 and §10 contain all changes from the original tariff that are effective on the date hereof)
Special Supplement.

— TO —

WEST-BOUND TARIFF No. 1-Q

(WHICH TOOK EFFECT MARCH 15, 1918)

— NAMING —

Local, Joint, Export and Import Class Rates

Governed by Western Classification No. 55 (I. C. C. No. 13 of R. C. Fye, Agent), supplements thereto or reissues thereof,
except as otherwise provided in tariff (and as amended)

— AND —

Local, Joint, Export, Import and Proportional Commodity Rates

Governed by Special Rules and Conditions shown in tariff (and as amended)

— FROM —

EASTERN SHIPPING POINTS

Designated on pages 2 to 27, inclusive, of tariff (and as amended)

— TO POINTS IN —

ARIZONA

MEXICO

NEW MEXICO

UTAH

CALIFORNIA

NEVADA

OREGON

Designated on pages 28 to 61, inclusive, of tariff (and as amended).

This tariff contains rates that are higher for shorter distances than for longer distances over the same route, such departure from the terms of the amended Fourth Section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Commission Orders F. S. Nos. 3136 of date August 2, 1913, 4206, 4208, 4210, 4215 and 4216 of date August 28, 1914, 4859 of date April 27, 1915, 7048 of date November 20, 1917, 7316 of May 27, 1918, and as indicated in individual items herein.

NOTE A.—By authority of Rule 77 of Interstate Commerce Commission Tariff Circular No. 18-A, this tariff is not made applicable FROM all intermediate points. Upon reasonable request therefor, commodity rates which will not exceed those in effect FROM the next more distant point will (under authority granted by the Interstate Commerce Commission) be established by the carriers parties to this tariff, FROM any intermediate point hereunder, upon one day's notice to the Commission and to the public.

NOTE B.—Departure from the Commission's rules in the publication of alternative rates bases authorized in Item 26, page 71 of tariff (and as amended), is permitted until October 31, 1918, under authority of Interstate Commerce Commission order of September 19, 1917, unless by reissue of or supplement to this tariff it is brought into conformity with the Commission's regulations at an earlier date.

ISSUED JULY 24, 1918

EFFECTIVE AUGUST 1, 1918

This special supplement is permitted by authority of Interstate Commerce Commission Special Permission No. 47201, of July 18, 1918.
Issued on one day's notice under Special Permission of the Interstate Commerce Commission No. 47210 of July 23, 1918.

Published for the Director General of Railroads and filed on one day's notice with the Interstate Commerce Commission, under Freight Rate Authority No. 95 of the Director, Division of Traffic, United States Railroad Administration, dated July 11, 1918.

ISSUED JOINTLY BY

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INDEX OF COMMODITIES CONTAINED IN THIS SUPPLEMENT.

COMMODITY	Item No. of this Sup.	COMMODITY	Item No. of this Sup.	COMMODITY	Item No. of this Sup.
Distillate, engine, 5358-A, 5360-A, 5362-A		Oil, petroleum, fuel, 5372-B, 5374-A, 5376-C, 5378-B, 5380-B, 5794-A to 5808-A, incl.		Oil, petroleum solar.....	5358-A
Oil, gas..... 5364-A, 5366-B		Oil, petroleum gas, 5358-A, 5794-A to 5808-A, incl.		Products, petroleum, 3240-A, 5368-A, 5370-A	
Oil, petroleum, 3240-A, 5368-A, 5370-A		Oil, petroleum, crude, 5372-A, 5374-A, 5376-C, 5378-B, 5380-B, 5794-A to 5808-A, incl.		Residuum, refinery, 5794-A to 5808-A, incl.	

PARTICIPATING CARRIERS.

The Participating Carriers are as shown on pages i to x, inclusive, of tariff, and as amended by Supplement No. 5.

SECTION 2—COMMODITY RATES

If the rates in Section 1, Section 3, Section 4, Section 5 or Section 6 of tariff (and as amended), make a lower charge on any shipment than the rates in Section 2 of tariff (and as amended), the rates in Section 1, Section 3, Section 4, Section 5 or Section 6 (whichever is lowest), will be applied.

Effective as noted. AMEND pages 141 to 202, inclusive, of tariff, as follows:

Item No.	ARTICLES	C. L. or L. C. L. as indicated	RATES IN CENTS PER 100 POUNDS (Except as noted)		
			Min. C. L. wt. (Pounds)	RATE BASIS 1	RATE BASIS 2
1395-A (Cancels 1396)	<p>Effective August 1, 1918 (in Supplement No. 10). (Cancels increased rates published effective June 25, 1918, in Special Supplement No. 6.)</p> <p>Oil, petroleum road (See Foot Note), In barrels, In tank cars, actual weight per gallon. *Class rates will not apply. No through rates in effect.</p>	<p>C. L. In barrels 60,000</p> <p>In tank cars, see Rule 11 of tariff (and as amended)</p>	<p>A B C D</p> <p>E F G H J</p>	<p>+</p> <p>+</p> <p>+</p> <p>[R]64½</p> <p>[R]64½</p> <p>[R]64½</p> <p>[R]64½</p> <p>[R]64½</p>	<p>+</p> <p>+</p> <p>+</p> <p>[R]64½</p> <p>[R]64½</p> <p>[R]64½</p> <p>[R]64½</p> <p>[R]64½</p>

SECTION 3.

COMMODITY RATES TO ARIZONA, CALIFORNIA, NEVADA, NEW MEXICO, OREGON AND UTAH.

If the rates in Section 1, Section 2, Section 4, Section 5 or Section 6 of tariff (and as amended), make a lower charge on any shipment than the rates named in Section 3 of tariff (and as amended), the rates in Section 1, Section 2, Section 4, Section 5 or Section 6 (whichever is lowest), will be applied.

Effective as noted. AMEND pages 205 to 278, inclusive, of tariff as follows:

Item No.	ARTICLES	C. L. or L. C. L. as indicated	RATES IN CENTS PER 100 POUNDS (Except as noted)		
			Min. C. L. wt. (Pounds)	RATE BASIS 3	Class Arbitrary See Item 27 of tariff (and as amended)
3240-A (Cancels 3240)	<p>Effective August 1, 1918 (in Supplement No. 10). (Cancels increased rates published effective June 25, 1918, in Special Supplement No. 6.)</p> <p>PETROLEUM AND PETROLEUM PRODUCTS, viz.: Oil, petroleum and its products, classified fifth class under heading of "Petroleum or Petroleum Products, including compounded Oils or Greases having a Petroleum Base" (exclusive of Sewing Machine and Cycle Oils), in current Western Classification, subject to rules, weights per gallon and minimum weights thereof. (See Foot Note).</p> <p>NOTE.—Rates named will apply also on Lubricating Compounds having a petroleum base and mixed with water or water-like substances.</p> <p>*The Southern Pacific Company, Pacific Steamship Lines (Morgan Line), Mallory Steamship Co., and Old Dominion Steamship Co., will not accept shipments of Paraffine Wax, in bulk, Benzine, Gasoline, Naphtha and Kerosene Oil, in barrels.</p>	<p>C. L. As per current Western Classification.</p>	<p>A B C D</p> <p>E F G H J</p>	<p>[R]129½</p> <p>[R]119½</p> <p>[R]114½</p> <p>[R]109½</p> <p>[R]104½</p> <p>[R]94½</p> <p>[R]94½</p> <p>[R]94½</p> <p>[R]94½</p>	

FOOT NOTE.—When the total charges on a through shipment are constructed on combinations of separately established rates applying to all from junction points, first determine the through combination of rates in effect on June 24, 1918, and then increase each through combination of rates four and one-half ($\frac{1}{4}$) cents per 100 lbs.

*Denotes reduction.

SOURCING and charges named in this supplement are not subject to increases shown in Special Supplement No. 6.

OFFICIAL FILE **SUPPLEMENT No. 27**

(Cancels Supplement No. 26)

(Supplements Nos. §6, 16, 20 and 27 contain all changes from the original tariff that are effective on the date hereof)
Special Supplement

TO

C. R. C. No. 30 of C. C. McCain, Agent
C. R. C. No. 571 of Eugene Morris, Agent
C. R. C. No. 380 of R. H. Countiss, Agent
Ohio No. 615 of Eugene Morris, Agent

I. C. C. No. 30 of C. C. McCain, Agent

I. C. C. No. 682 of Eugene Morris, Agent

I. C. C. No. 1048 of R. H. Countiss, Agent

Filed with the Public Utilities Commission of Ohio for account of non-federal controlled roads only.

UNITED STATES RAILROAD ADMINISTRATION
Director General of Railroads

TRANS-CONTINENTAL FREIGHT BUREAU
SUPPLEMENT No. 27

(Cancels Supplement No. 26)

(Supplements Nos. §6, 16, 20 and 27 contain all changes from the original tariff that are effective on the date hereof)
Special Supplement

TO

WEST-BOUND TARIFF No. 1-Q

(WHICH TOOK EFFECT MARCH 15, 1918)

NAMING

Local, Joint, Export and Import Class Rates

Governed by Western Classification No. 55 (I. C. C. No. 13 of R. C. Fife, Agent), supplements thereto or reissues thereof, except as otherwise provided in tariff (and as amended)

AND

Local, Joint, Export, Import and Proportional Commodity Rates

Governed by Special Rules and Conditions shown in tariff (and as amended)

FROM

EASTERN SHIPPING POINTS

Designated on pages 2 to 27, inclusive, of tariff (and as amended)

TO POINTS IN

ARIZONA

MEXICO

NEW MEXICO

UTAH

CALIFORNIA

NEVADA

OREGON

Designated on pages 28 to 61, inclusive, of tariff (and as amended).

This tariff contains rates that are higher for shorter distances than for longer distances over the same route, such departure from the terms of the amended Fourth Section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Commission Orders F. S. Nos. 3136 of date August 2, 1913, 4206, 4208, 4210, 4215 and 4216 of date August 28, 1914, 4859 of date April 27, 1915, 7046 of date November 20, 1917, 7316 of May 27, 1918, and as indicated in individual items of tariff (and as amended).

NOTE A.—By authority of Rule 77 of Interstate Commerce Commission Tariff Circular No. 18-A, this tariff is not made applicable FROM all intermediate points. Upon reasonable request therefor, commodity rates which will not exceed those in effect FROM the next more distant point will (under authority granted by the Interstate Commerce Commission) be established by the carriers parties to this tariff, FROM any intermediate point hereunder, upon one day's notice to the Commission and to the public.

NOTE B.—Departure from the Commission's rules in the publication of alternative rate bases authorized in Item 26-A, page 18 of Supplement No. 16, is permitted until October 31, 1919, under authority of Interstate Commerce Commission order of October 17, 1918, unless by reissue of or supplement to this tariff it is brought into conformity with the Commission's regulations at an earlier date.

NOTE C.—Departure from the requirements of Rules 4(h) and 7(b) of Interstate Commerce Commission's Tariff Circular 18-A, in items 29-C, 30-B and 303-A of this supplement is permitted by Special Permission of the Interstate Commerce Commission No. 47986, dated June 21, 1919.

NOTE D.—Changes which result from additions of or abandonment of stations and station facilities contained in this supplement are filed under authority of the Interstate Commerce Commission's Fifteenth Section Order No. 250 of January 8, 1918, without formal hearing, which approval shall not affect any subsequent proceeding relative thereto.

NOTE E.—Increases contained in this schedule are filed for account of non-Federal controlled carriers, under authority of the Interstate Commerce Commission's Fifteenth Section Orders to which reference is made in connection with individual items involved.

ISSUED AUGUST 27, 1919

EFFECTIVE OCTOBER 15, 1919

(Except as noted in individual items)

Departure from the requirements of Rule 9 (e) of Tariff Circular 18-A as to the volume of supplemental matter to which this tariff is entitled is permitted by Special Permission of the Interstate Commerce Commission, No. 48069 of July 22, 1919. The tariff amended by this supplement will be reissued not later than April 15, 1920.

ISSUED JOINTLY BY

EUGENE MORRIS, Agent,

608 South Dearborn Street,

Chicago, Ill.

R. H. COUNTISS, Agent,

608 South Dearborn Street,

Chicago, Ill.

Item No.	ARTICLES	RATES IN CENTS PER 100 POUNDS (Except as noted)			
		C. L. or L. C. L. as indicated	FROM	TO	Class Arbitra-
		Min. C. L. wt. (Pounds)	Points shown on pages 28 to 56, includ- ing all amend- ments, as of the follow- ing Group Rates	Points shown on pages 28 to 56, includ- ing all amend- ments, as of the follow- ing Group Rates	— See Item 27 of tariff (and as amended)
	LEATHERS, ETC., in rolls (except as otherwise provided), viz.— Concluded: ★Effective October 15, 1919 (in Supplement No. 27). (Cancels increased rates published effective June 26, 1918, in Special Supplement No. 6.)				
3125-A (Cancels 3125)	Board, leather, Buff, Butts, belting, Calf, finished, Caps, horse collar, Chamois, Collar, Cow, finished, Deer, tanned, Goat, with hair on, tanned, Harness,	Heads, Kip, finished, Lace, Latigo, Pancake, Patent, Pieces, Rough, Rough Split, Scrap, in sacks, Seal, Skins, goat, with- out hair, tanned,	Skins, sheep, with or without wool, tanned, Skins, shearing, tanned, Skirting, Sole, Tufts, in sacks, Veal, finished, Walrus, Wax, finished.	C. L. 24,000	A 219 B 206½ C 200 D 194 E 187½ F 176 G 175 H 176 J 176
OILS, viz.: REISSUE. Effective as per Note A below (in Supplement No. 23). Castor, Coconut, Corn, Kalon, Lard, Linseed, Lucol, Neatsfoot, Paint, N. O. S., Palm, Pine, Rape Seed, Red, Resin, Rubber, Soya Bean, Tallow, Transel, "Y"				C. L. In pack- ages, named 30,000	A 156½ B 144 C 137½ D 131½ In tank cars, see Rule 11 of tariff (and as amend- ed).
3220-C (Cancels 3220-B, Sup. 16)		in cans, boxed, or in bulk in barrels; or in tank cars, actual weight per gallon (ex- cept as shown in Note 1, below).			E 125 F 112½ G 112½ H 112½ J 112½
	NOTE 1.—When shipped in tank cars, the weight of the following oils will be computed on basis of pounds per gallon shown opposite each, viz.: Castor Oil..... 8 Linseed Oil..... 7.8 Resin or "Y" Oil 8.5 Coconut Oil.... 7.6 Neatsfoot Oil.... 7.6 Tallow Oil..... 7.6 Lard Oil..... 7.6 Red Oil..... 7.6				
3240-B (Cancels 3240-A, Sup. 16)	REISSUE. Effective September 10, 1919 (in Supplement No. 26). Oil, petroleum and its products, classified fifth class under heading of "Petroleum or Petroleum Products, including com- pounded Oils or Greases having a Petroleum Base" (exclusive of Sewing Machine and Cycle Oils), in current Western Classifica- tion, subject to rules, weights per gallon and minimum weights thereof. (***). NOTE.—Rates named will apply also on Lubricating Compounds having a petroleum base and mixed with hair, waste or yarn. The Southern Pacific Company—Atlantic Steamship Lines (Morgan Line), Mallory Steamship Co., and Old Dominion Steamship Co., will not accept shipments of Paraffine Wax, in bulk, Benzine, Gaso- line, Naphtha and Kerosene Oil, in barrels.			A 129½ B 119½ C 114½ D 109½ As per current Western Classifi- cation.	\$129½ 119½ 114½ 109½ 104½ 94½ 94½ 94½ 94½

*** FOOT NOTE reading—"When the total charges on a through shipment are constructed on combinations of separately established rates applying to and from junction points, first determine the through combination of rates in effect on June 24, 1918, and then increase such through combination of rates four and one-half (4½) cents per 100 lbs."—ELIMINATED. Combination rates will apply.

REISSUE. Effective July 1, 1919 (in Supplement No. 23), in connection with carriers under Federal control
as designated in Note A, page 2, hereof.

NOTE A.—REISSUE. Effective July 21, 1919 (in Supplement No. 23), in connection with participating carriers not de-
signated as under Federal control in Note A, page 2, hereof.

★Published for the Director General of Railroads and filed on 30 days' notice with the Interstate Commerce Commission under
Freight Rate Authority No. 11183 of the Director, Division of Traffic, United States Railroad Administration, dated July 25, 1919.

■ Denotes Reduction.

Ariz. C. C. No. 104.
(See page 3 for cancellations.)

New Mex. C. C. No. 182.
(See page 3 for cancellations.)

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TARIFF NO. II877.
(See page 3 for cancellations.)

Atchison, Topeka & Santa Fe Railway—Coast Lines
Atchison, Topeka & Santa Fe Railway— { Santa Fe, Prescott &
Phoenix Lines
Grand Canyon Railway (Concurrence FX-4, No. 71)

Property of
LOCAL AND JOINT TARIFF
SANTA FE TRAFFIC DEPT.
APPLYING ON
San Francisco, Calif.
CLASSES AND COMMODITIES

BETWEEN

Stations in New Mexico and Arizona, on Atchison, Topeka & Santa Fe Railway—Coast Lines,
Atchison, Topeka & Santa Fe Railway—Santa Fe, Prescott & Phoenix
Lines, and Grand Canyon Railway

Governed, except as otherwise provided herein, by the Western Classification No. 52 (R. C. Fyfe, Agent,
I. C. C. No. 10), supplements thereto and reissues thereof; and by Exceptions to said Classification,
No. 7188-1, P. F. T. B. Exception Sheet No. 1-D (F. W. Gomph, Agent, I. C. C. No. 160, A. C. C.
No. 79, N. M. C. C. No. 5), supplements thereto and reissues thereof.

Issued August 20, 1914.

Effective October 1, 1914.

F. B. HOUGHTON,
F. T. M., A. T. & S. F. Ry.
CHICAGO, ILL.

W. A. BISSELL,
A. T. M., A. T. & S. F. Ry.
SAN FRANCISCO, CAL.

H. P. ANEWALT,
G. F. A., { A. T. & S. F. Ry.—Coast Lines,
{ A. T. & S. F. Ry.—S. F. P. & P. Lines,
(Grand Canyon Ry.,
LOS ANGELES, CAL.

J. S. BARTLE,
A. F. T. M., A. T. & S. F. Ry.,
CHICAGO, ILL.

W. G. BARNWELL,
A. F. T. M., A. T. & S. F. Ry.,
SAN FRANCISCO, CAL.

Issued by
A. G. SHEER,
Chief of Tariff Bureau,
CHICAGO, ILL.

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Supplement No. 26
(Cancels Supplement No. 25)
(Supplement No. 26 contains all changes from the original
tariff that are effective on the date hereof)
To
Aris. C. C. No. 104.

Supplement No. 26
(Cancels Supplement No. 25)
(Supplement No. 26 contains all changes from the original
tariff that are effective on the date hereof)
To
New Mex. C. C. No. 182.

SUPPLEMENT No. 26

(Cancels Supplement No. 25)

(Supplement No. 26 contains all changes from the original tariff that are effective on the date hereof)

TO

TARIFF No. 11877.

107

Atchison, Topeka & Santa Fe Railway—Coast Lines

Atchison, Topeka & Santa Fe Railway—^{{Santa Fe, Prescott & Phoenix Lines}

Grand Canyon Railway

(Concurrence FX-4, No. 71)

LOCAL AND JOINT TARIFF

APPLYING ON

CLASSES AND COMMODITIES

BETWEEN

Stations in New Mexico and Arizona on Atchison, Topeka & Santa Fe Railway—Coast Lines,
Atchison, Topeka & Santa Fe Railway—^{Santa Fe, Prescott & Phoenix}
Lines, and Grand Canyon Railway.

Governed, except as otherwise provided herein, by the Western Classification, A. T. & S. F. Ry. (R. C. Fyfe, Agent, I. C. C.)
No. 12, supplements thereto and reissues thereof, and by Exemption to Said Classification, A. T. & S. F.
Ry. No. 7185-J, P. F. T. B. Exception Sheet No. 1-E (F. W. Gomph, Agent, I. C. C.)
No. 252, A. C. C. No. 122, N. M. C. C. No. 11), supplements thereto and reissues thereof.

Issued January 26, 1917.

Effective March 10, 1917.
(Except as Noted in Individual Items.)

F. B. HOUGHTON,
F. T. M., A. T. & S. F. Ry.,
CHICAGO, ILL.

W. A. BISSELL,
A. T. M., A. T. & S. F. Ry.,
SAN FRANCISCO, CAL.

H. P. ANEWALT,
G. F. A., { A. T. & S. F. Ry.—Coast Lines,
{ A. T. & S. F. Ry.—S. F. P. & P. Lines,
Grand Canyon Ry.,
LOS ANGELES, CAL

J. S. BARTLE,
A. F. T. M., A. T. & S. F. Ry.,
CHICAGO, ILL.

W. G. BARNWELL,
A. F. T. M., A. T. & S. F. Ry.,
SAN FRANCISCO, CAL.

Issued by
A. G. SHEER,
Chief of Tariff Bureau,
CHICAGO, ILL.

RATE SECTION No. 1—PART 1—Concluded.

Index No.	BETWEEN Seligman.....Ariz. AND	CLASS RATES IN CENTS PER 100 LBS.									
		1	2	3	4	5	A	B	C	D	E
69	Reissue. Effective December 30, 1916, in Supplement No. 25. ①Winona.....Ariz.	62	52	43	39	35	35	24	19	16	12

Index No.	BETWEEN Thoreau.....N. M. AND	CLASS RATES IN CENTS PER 100 LBS.								
		1	2	3	4	5	A	B	C	D	E
103 to 116	*Zuni.....N. M. to Grants, incl....."									

**Reissue. Effective August 1, 1916, in Supplement No. 21.
Cancel Class rates.
Distance Tariff rates, page 22 of this Supplement, or as may be amended, will apply.**

PART 2.

Index No.	BETWEEN ②③Cedar Glade....Ariz. AND	CLASS RATES IN CENTS PER 100 LBS.									
		1	2	3	4	5	A	B	C	D	E
179-A	*Mack.....Ariz.	14	13	11	10	9	9	6	6	5	4
180	*Bear....."	18	16	14	13	12	12	8	7	6	5
181	*Perkinsville....."	22	20	18	15	14	14	10	9	8	7
182	*Sycamore....."	28	25	22	20	18	18	13	11	10	8
182-A	*Tapco....."	②④24	②④30	②④27	②④23	②④21	②④21	②④14	②④12	②④10	②④9
183	Clarkdale....."	34	30	27	23	21	21	14	12	10	9

Reissue. Effective December 30, 1916, in Supplement No. 25.

Index No.	BETWEEN ②③P. & E. Jct....Ariz. AND	CLASS RATES IN CENTS PER 100 LBS.									
		1	2	3	4	5	A	B	C	D	E
184	*Yaeger.....Ariz.	14	13	11	10	9	9	6	6	5	4
185	Cherry Creek....."	18	16	14	13	12	12	8	7	6	5
186	Humboldt....."	22	20	18	15	14	14	10	9	8	7
187	*Iron King....."	22	20	18	15	14	14	10	9	8	7
188	*Huron....."	25	23	20	18	16	16	11	10	9	8
189	*Poland Jct....."	25	23	20	18	16	16	11	10	9	8
190	*Arizona City....."	25	23	20	18	16	16	11	10	9	8
191	Mayer....."	28	25	22	20	18	18	13	11	10	9
192	*Henrietta.....Ariz.	25	23	20	18	16	16	11	10	9	8
193	*Eugenie....."	25	23	20	18	16	16	11	10	9	8
194	*Providence....."	28	25	22	20	18	18	13	11	10	9
195	*Block....."	28	25	22	20	18	18	13	11	10	9
196	*Poland....."	28	25	22	20	18	18	13	11	10	9
197	*Blue Bell.....Ariz.	28	25	22	20	18	18	13	11	10	8
198	*Cordes....."	31	27	24	21	19	19	13	11	10	8
199	*Turkey Creek....."	34	30	27	23	21	21	14	12	10	9
200	*Middleton....."	37	32	29	25	23	23	16	13	11	9
201	*Peek....."	37	32	29	25	23	23	16	13	11	9
202	*Saddle....."	40	35	31	27	25	25	17	14	12	9
203	Crown King....."	42	36	31	27	25	25	17	14	12	9

No Agent. On shipments destined to points prefixed thus (), freight charges must be prepaid.

①Class rates apply on Arizona Intrastate traffic only. On Interstate traffic distance tariff rates per Section No. 3, Part 1, of tariff, apply.

②Class rates apply on Interstate traffic only.

③For Class rates applicable on Arizona Intrastate traffic only, see pages 80, 81 and 82 of tariff.

④Indicates reduction in rates.

SPECIAL SUPPLEMENT TO TARIFFS
UNITED STATES RAILROAD ADMINISTRATION,
W. G. McAdoo, Director General of Railroads.

ISSUED BY

Atchison, Topeka & Santa Fe Railway

Atchison, Topeka & Santa Fe Railway—Coast Lines

Atchison, Topeka & Santa Fe Railway—(Santa Fe, Prescott & Phoenix Lines)

Grand Canyon Railway

(Concurrence FX4-No. 71)

Gulf, Colorado & Santa Fe Railway

(Concurrence FX4-No. 72)

Kansas Southwestern Railway

(Concurrence FX4-No. 2)

Leavenworth & Topeka Railway

(W. A. Austin, Receiver)
(Concurrence FX5-No. 3)

Panhandle & Santa Fe Railway

(Concurrence FX5-No. 1)

Port Bolivar Iron Ore Railway

(Concurrence FX5-No. 1)

Rio Grande, El Paso & Santa Fe Railroad

(Concurrence FX5-No. 1)

APPLYING IN CONNECTION WITH

Participating Carriers shown in Tariffs and Supplements thereto enumerated herein.

INCREASE IN RATES.

Rates named in Tariffs and Supplements thereto, listed on page 2, are hereby increased the amount shown on page 2.
(See Application of Rates, page 2.)

Increased joint rates and charges contained in this schedule are filed on one day's notice under authority of Interstate Commerce Commission's Fifteenth Section Order No. 666, of May 27, 1918, without formal hearing, which approval shall not affect any subsequent proceeding relative thereto.

This schedule contains rates that are departures from the terms of the amended Fourth Section of the Act to Regulate Commerce under authority of Interstate Commerce Commission's Fourth Section Order No. 7316 of May 27, 1918.

The form of this supplement is permitted by authority of Interstate Commerce Commission Special Permission No. 47201 of July 18, 1918.

Issued July 29, 1918.

Effective August 1, 1918.

NOTE 1.—Published for the Director General of Railroads and filed on one day's notice with the Interstate Commerce Commission under Freight Rate Authority No. 96, of the Director, Division of Traffic, United States Railroad Administration, dated July 11, 1918.

F. B. HOUGHTON,
F. T. M., A. T. & S. F. Ry.,
CHICAGO, ILL.

F. H. MANTER,
A. G. F. A., A. T. & S. F. Ry.,
CHICAGO, ILL.

C. C. DANA,
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W. R. BROWN,
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EL PASO, TEX.

J. R. KOONTZ,
G. F. A. [A. T. & S. F. Ry.,
W. S. W. Ry.,
TOPEKA, KAN.]

J. S. HERSHHEY,
G. F. A., G. C. & S. F. Ry.,
GALVESTON, TEX.

Issued by
A. G. SHEER,
Chief of Tariff Bureau,
CHICAGO, ILL.

PETROLEUM AND PETROLEUM PRODUCTS, C. L.

This Supplement cancels the increased rates on Petroleum and Petroleum Products (Class or Commodity) except increased rates on Road Oil and Wax Tailings, carloads, contained in the Special Supplement issued June 19, 1918, and effective June 25, 1918.

Rates on Petroleum and Petroleum Products, carloads, classified 5th Class in Western or Illinois Classifications, are hereby increased the amount shown:

$\frac{1}{4}$ cents per 100 lbs. higher than the rates (class or commodity) effective May 25, 1918, but not in excess of 5th Class rates as increased June 25, 1918, subject to rule below for disposition of fractions.

COMBINATION RATES.

When the total charges on a through shipment are constructed on combination of separately established rates applying to and from junction points, first determine the through combination of rates in effect on May 25, 1918, and then increase such combinations of rates by $\frac{1}{4}$ cents per 100 pounds, 5th Class rates as increased June 25, 1918, not to be exceeded.

Exception.—This supplement does not apply in connection with rates for switching service in connection with a line haul.

MINIMUM CHARGE.

The minimum charge will be \$15.00 per car. (Does not apply to charge for switching service in connection with a line haul or to intra or inter yard switching.)

RULE FOR DISPOSITION OF FRACTIONS.

In applying increased rates, fractions will be disposed of as follows:

Rates per 100 Pounds or per Package.

Fractions of less than $\frac{1}{4}$, or .25, omit.

Fractions of $\frac{1}{4}$, or .25, or greater, but less than $\frac{1}{2}$, or .75, state as one-half ($\frac{1}{2}$), or as fifty one-hundredths (.50).

Fractions of $\frac{1}{2}$, or .75, or greater, increase to the next whole figure.

LIST OF TARIFFS SUPPLEMENTED HEREBY.

NOTE.—The increases made by this supplement apply to the entire rates as named in the tariffs listed below, whether such rates are published as specific totals or are made up by use of differentials or arbitrages.

I. C. C. No.	Supplement No.	"Santa Fe" Tariff No.	Supplements Containing All Changes from the Original Tariff.	I. C. C. No.	Supplement No.	"Santa Fe" Tariff No.	Supplements Containing All Changes from the Original Tariff.
4205	②22, ①25	8114-A	②20, ③②1, ③②2, ④②3, ⑤③④, ⑤③⑤.	7534	①16, ③⑦	6642-E	①②④, ①⑤, ①⑥, ②③⑤ ②⑥, ③⑦.
4422	15	5791-A	11, ③④, 15.	7536	①14, ③⑦	6188-G	①③②, ①③③, ①④, ②③⑤ ②⑥, ③⑦.
6253	8	7824-E	6, ③⑦, 8.				
6636	18	8239-F	16, ③⑦, 18.	7543	8	8225-E	6, ③⑦, 8.
6692	21	6055-D	②19, 20, 21.	7547	14	6815-F	10, 12, ③③, 14.
6781	①18, ③②2	5963-D	①⑥, ①③⑦, ①⑧, ②⑩, ③②⑨, ③②⑩.	7548	5	7393-D	3, ③④, 5.
6821	5	7332-B	3, ③④, 5.	7549	①8, ②⑪	6612-C	①②, ①③④, ①⑤⑦, ①⑧, ②②, ②⑨, ③⑩, ③⑪.
6853	①36, ③④3	11877-V	26, ③③, ①③④, ①③⑤, ①③⑥, ④④, ④④1, ④④2, ④④3.	7583	13	5996-H	5, 11, ③②, 12, 13.
6889	2	6841-G	③①, 2.	7599	4	11275-A	③④, 4.
7010	5	6583-A	1, ③④, 5.	7679	①5, ③⑥	7641-I	③, ①③④, ①⑤, ③③, ②④, ②⑤, ②⑥.
7073	①34, ③⑤	9885-B	②21, ③①, ①③②, ①③③, ①③④, ②①, ③②③, ③③, ③②④, ③③⑤.	7680	10	12542-B	8, ③⑨, 10.
7131	9	6204-J	6, ③⑦, 8, 9.	7730	①5, ③⑥	8224-B	③, ①③④, ①⑤, ③④, ②③⑤, ②⑥.
7136	4	12280	③③, 4.	7732	①3, ③④	6082-G	①, ①③②, ③③, ②③③, ③④.
7188	16	8240-C	14, ③⑤, 16.	7735	①5, ③⑥	8069-D	③, ①③④, ①⑤, ③④, ②③⑤, ②⑥.
7252	15	10265-B	13, ③④, 15.	7736	①5, ③⑥	7712-F	③, ①③④, ①⑤, ③④, ②③⑤, ②⑥.
7298	8	11917-A	6, ③⑦, 8.	7739	①6, ③⑦	10350-F	③, ④, ①③⑤, ①⑥, ③④, ③⑤, ③⑥⑦.
7347	4	11700-C	③③, 4.	7740	①5, ③⑥	8400-C	③, ①③④, ①⑤, ③④, ②③⑤, ③⑥.
7356	17	11569-B	15, ③⑥, 17.				
7359	4	7961-R	③③, 4.				
7379	19	7466-D	2, ③⑦, 18, 19.				
7388	①24, ③⑥	5681-F	③②, ①③②, ①③④, ②④, ③③⑤, ③③⑥.	7824	3	6108-I	③, 2, 3.
7391	25	12040	15, 23, ③②, 25	7834	2	11636-C	③, 1, 2.
7421	①24, ③⑨	5600-F	①⑧, ①②②, ①③②, ①④②, ①⑤②, ③④②, ③④③, ③④④.	7868	2	11280-D	③, 1, 2.
7428	13	9777-E	11, ③②, 12, 13.	7905	2	5947-J	③, 1, 2.
7442	14	7555-E	11, ③②, 13, 14.	7908	3	6806-H	③, 1, 2, 3.
7469	①11, ③⑩	9367-C	①⑧, ①⑨, ①⑩, ①⑪, ①⑫, ①⑬, ③⑨, ③⑩, ③⑪, ③⑫.	7958	2	5705-F	④, ③⑤, 6, 7.
7475	15	5645-G	11, ③③, ③④, 15.	7965	2	6717-B	③, 1, 2.
7502	①11, ③⑫	5760-G	①⑧, ①⑨, ①⑩, ①⑪, ①⑫, ①⑬, ③⑩, ③⑪, ③⑫.	7971	15	9428-C	13, ③⑭, 15.
7504	26	6510-F	22, 24, ③⑤, 26.				

①Indicates effective supplements to the I. C. C. No.

②Indicates effective supplements to the Tariff No.

③Indicates special supplement covering general increase in rates, issued June 19, 1918.

④Indicates K. S. W. Ry. Tariff and I. C. C. No.

⑤Indicates Okla. Cent. Ry. (now A. T. & S. F. Ry.) Tariff and I. C. C. No.

'OTE.—RATES AND CHARGES NAMED IN THIS SUPPLEMENT ARE NOT SUBJECT TO INCREASES SHOWN IN SPECIAL SUPPLEMENT No. 42 OF TARIFF, SUPPLEMENT No. 35 TO I. C. C. No. 6853.

Supplement No. 41

(Cancels Supplements Nos. 39 and 40)
(Supplements Nos. 26, 35 and 47 contain all changes from
the original tariff that are effective on the date hereof)

I. C. C. No. 6853.

Supplements to this Tariff will be
in effect at any time.

SUPPLEMENT No. 48

(Cancels Supplements Nos. 46 and 47)

Supplements Nos. 26, 35 and 48 contain all changes from the original tariff that are effective on the date hereof)

TO

TARIFF No. 11877.

1037
Special Supplement

UNITED STATES RAILROAD ADMINISTRATION,

Director General of Railroads.

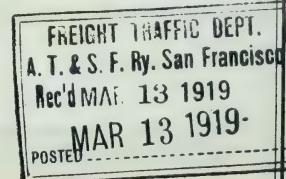
Atchison, Topeka & Santa Fe Railroad—Coast Lines

**Atchison, Topeka & Santa Fe Railroad—<sup>{ Santa Fe, Prescott
& Phoenix Lines</sup>**

Grand Canyon Railroad

LOCAL AND JOINT TARIFF

APPLYING ON



CLASSES AND COMMODITIES

BETWEEN

Stations in New Mexico and Arizona on Atchison, Topeka & Santa Fe Railroad—Coast Lines,
Atchison, Topeka & Santa Fe Railroad—Santa Fe, Prescott & Phoenix
Lines, and Grand Canyon Railroad.

Governed, except as otherwise provided herein, by the Western Classification No. 55 (R. C. Fyfe, Agent, I. C. C.
No. 13), supplements thereto and reissues thereof; and by Exceptions to said Classification,
A. T. & S. F. R. R. No. 7185-K, P. F. T. B. Exception Sheet No. I-F (F. W. Gomph, Agent,
I. C. C. No. 305), supplements thereto and reissues thereof.

Issued March 4, 1919.

Effective April 14, 1919.

(Except as Noted in Individual Items and on Pages 2, 3, 6, 7 and 8.)

F. B. HOUGHTON,
F. T. M., A. T. & S. F. R. R.,
CHICAGO, ILL.

A. M. REINHARDT,
A. G. F. A., A. T. & S. F. R. R.,
Grand Canyon R. R.,
LOS ANGELES, CAL.

W. G. BARNWELL,
A. F. T. M., A. T. & S. F. R. R.,
SAN FRANCISCO, CAL.

Issued by
A. G. SHEER,
A. G. F. A., A. T. & S. F. R. R.,
CHICAGO, ILL.
(Appointment Notice No. 3)

STATION CHANGES.

Index No.	NOW READS:	Index No.	CHANGE TO READ:	DATE EFFECTIVE.	In Supplement No. to I. C. C.
16	Mineral.....Ariz.	16	*Mineral.....Ariz.	Reissue. November 10, 1918...	37
25	*Hualapai.....Ariz.	25	*Walapai.....Ariz.	Reissue. November 10, 1918...	37
80	*Hardy.....Ariz.	80	*Havre.....Ariz.	Reissue. November 10, 1918...	37
121	*Alaska.....N. M.	121	*Acomita.....N. M.	Reissue. November 10, 1918...	37

EXCEPTIONS TO CURRENT WESTERN CLASSIFICATION.

Item No.	COMMODITY.	CLASSIFICATION.	
		L. C. L.	C. L.
5-B cancels 5-A	Reissue. Effective May 18, 1917, in Supplement No. 29. Scrap Iron, as described under that heading in the current Western Classification, C. L. Min. wt. 30,000 lbs. NOTE.—Applicable only on the A. T. & S. F. R. R.—S. F. P. & P. Lines (Index Nos. 138 to 216, incl.)		E (See Note.)

RULES AND REGULATIONS.

REFRIGERATION CHARGES.

ITEM No. 7-A, cancels 7.—**Reissue.** Effective May 5, 1917, in Supplement No. 28.—The freight rates shown in tariff, or as may be amended, cover the charge for transporting freight **only**, and do not include charge for any additional service, such as icing, refrigeration, protection of property from frost and freezing, heating, or other such accessory services, unless otherwise specifically provided in tariffs, lawfully on file with the Interstate Commerce Commission and State Commissions.

RULES FOR CONSTRUCTING COMBINATION RATES ON:
PETROLEUM AND PETROLEUM PRODUCTS, C. L.

ITEM No. 26.—Effective March 15, 1919. (See Note 7, below.) [When the total charges on a through shipment of Petroleum and Petroleum Products, C. L., classified 5th Class in current Western Classification, are constructed on combination of separately established rates applying to and from junction points, first determine the through combination of rates, in effect on June 24, 1918, and then increase such combination of rates by 4½ cents per 100 pounds, 5th Class rates as increased June 25, 1918, not to be exceeded.

NOTE.—Rule for disposition of fractions. (Rates per 100 pounds):

Fractions of less than $\frac{1}{4}$, or .25, omit.

Fractions of $\frac{1}{4}$, or .25, or greater, but less than $\frac{1}{2}$, or .75, state as one-half ($\frac{1}{2}$), or as fifty one-hundredths (.50).

Fractions of $\frac{1}{2}$, or .75, or greater, increase to the next whole figure.

BRICK, GRAVEL, SAND AND STONE, C. L.

ITEM No. 27.—**Reissue.** Effective February 15, 1919, in Supplement No. 40 to I. C. C. No. 6853, Supplement No. 47 to tariff. Rule shown in Special Supplement No. 35 to I. C. C. No. 6853, Supplement No. 42 to tariff for constructing combination rates on Brick (except Enamelled or Glazed), C. L., Sand and Gravel, C. L., Stone, Artificial and Natural, Building and Monumental (except carved, lettered, polished or traced), C. L., Stone, Broken, Crushed and Ground, C. L., and articles taking same rates, or arbitrates over or under same, is cancelled.

Except as otherwise provided in subsequent supplements, rates on Brick (except Enamelled or Glazed), C. L., Sand and Gravel, C. L., Stone, Artificial and Natural, Building and Monumental (except carved, lettered, polished or traced), C. L., Stone, Broken, Crushed and Ground, C. L., are subject to the rules for constructing combination rates, as provided in "Santa Fe" Tariff No. 12900 (Agent Eugene Morris) Freight Tariff No. 228, I. C. C. No. U. S. 1), supplements thereto or reissues thereof.

MAXIMUM RATES IN ARIZONA.

ITEM No. 30-A, cancels No. 30.—Effective April 14, 1919. (See Note 1 below). [Refer to page 12 of tariff and cancel Item No. 30, relative to maximum rates within Arizona.

No Agent. On shipments destined to points prefixed thus (), freight charges must be prepaid.

NOTE 1.—Published for the Director General of Railroads and filed on thirty (30) days' notice with the Interstate Commerce Commission under Freight Rate Authority No. 4602 of the Director, Division of Traffic, United States Railroad Administration, dated February 5, 1919.

NOTE 7.—Published for the Director General of Railroads and filed on one (1) day's notice with the Interstate Commerce Commission under Freight Rate Authority No. 96 of the Director, Division of Traffic, United States Railroad Administration, dated July 11, 1918.

[A]Indicates advance.

[R]Indicates reduction.

RATE SECTION No. 2, COMMODITY RATES—Concluded.

ITEM No. 572. Effective March 15, 1919. (See Note 8, below.)

[RE]OIL, PETROLEUM, AND ITS PRODUCTS.

Rates on Oil, Petroleum and Petroleum Products, classified Fifth (5th) Class in Western Classification No. 55, R. C. Fyfe, Agent, I. C. C. No. 13, in carloads, will be as shown below and subject to Rules, Minimum and Estimated Weights, as provided in Western Classification No. 55, R. C. Fyfe, Agent, I. C. C. No. 13, unless otherwise specifically provided in tariffs.

NOTE 1.—The weight and charges on Oil, Petroleum, and its Products, as referred to above, when transported in tank cars, will be based on full gallonage capacity of the tank cars. For gallonage capacity of tank cars, see "Santa Fe" Circular No. 2012-Q (United States and Canadian Railroad Circular No. 6-N, E. B. Boyd, Agent, I. C. C. No. A-906), supplements thereto and reissues thereof.

See Item No. 26, page 2, for Combination Rule.

Application.—Between all points in New Mexico and Arizona on A. T. & S. F. R. R.—Coast Lines, and A. T. & S. F. R. R.—S. F. P. & P. Lines (on the one hand) and all points in New Mexico and Arizona on A. T. & S. F. R. R.—Coast Lines, and A. T. & S. F. R. R.—S. F. P. & P. Lines (on the other hand).

When Fifth Class Rate, in Cents per 100 Lbs., is:	Apply Figures Shown Below in Cents per 100 Lbs.	When Fifth Class Rate, in Cents per 100 Lbs., is:	Apply Figures Shown Below in Cents per 100 Lbs.	When Fifth Class Rate, in Cents per 100 Lbs., is:	Apply Figures Shown Below in Cents per 100 Lbs.	When Fifth Class Rate, in Cents per 100 Lbs., is:	Apply Figures Shown Below in Cents per 100 Lbs.	When Fifth Class Rate, in Cents per 100 Lbs., is:	Apply Figures Shown Below in Cents per 100 Lbs.
24	23.5	54.5	48	85	72.5	115.5	97	145.5	121
24.5	24	55	48.5	85.5	73	116	97.5	146	121.5
25	24.5	55.5	49	86	73.5	116.5	97.5	146.5	121.5
25.5	25	56	49.5	86.5	73.5	117	98	147	122
26	25.5	56.5	49.5	87	74	117.5	98.5	147.5	122.5
26.5	25.5	57	50	87.5	74.5	118	99	148	123
27	26	57.5	50.5	88	75	118.5	99.5	148.5	123.5
27.5	26.5	58	51	88.5	75.5	119	99.5	149	123.5
28	27	58.5	51.5	89	75.5	119.5	100	149.5	124
28.5	27.5	59	51.5	89.5	76	120	100.5	150	124.5
29	27.5	59.5	52	90	76.5	120.5	101	150.5	125
29.5	28	60	52.5	90.5	77	121	101.5	151	125.5
30	28.5	60.5	53	91	77.5	121.5	101.5	151.5	125.5
30.5	29	61	53.5	91.5	77.5	122	102	152	126
31	29.5	61.5	58.5	92	78	122.5	102.5	152.5	126.5
31.5	29.5	62	54	92.5	78.5	123	103	153	127
32	30	62.5	54.5	93	79	123.5	103.5	153.5	127.5
32.5	30.5	63	55	93.5	79.5	124	103.5	154	127.5
33	31	63.5	55.5	94	79.5	124.5	104	154.5	128
33.5	31.5	64	55.5	94.5	80	125	104.5	155	128.5
34	31.5	64.5	56	95	80.5	125.5	105	155.5	129
34.5	32	65	56.5	95.5	81	126	105.5	156	129.5
35	32.5	65.5	57	96	81.5	126.5	105.5	156.5	129.5
35.5	33	66	57.5	96.5	81.5	127	106	157	130
36	33.5	66.5	57.5	97	82	127.5	106.5	157.5	130.5
36.5	33.5	67	58	97.5	82.5	128	107	158	131
37	34	67.5	58.5	98	83	128.5	107.5	158.5	131.5
37.5	34.5	68	59	98.5	83.5	129	107.5	159	131.5
38	35	68.5	59.5	99	83.5	129.5	108	159.5	132
38.5	35.5	69	59.5	99.5	84	130	108.5	160	132.5
39	35.5	69.5	60	100	84.5	130.5	109	160.5	133
39.5	36	70	60.5	100.5	85	131	109.5	161	133.5
40	36.5	70.5	61	101	85.5	131.5	109.5	161.5	133.5
40.5	37	71	61.5	101.5	85.5	132	110	162	134
41	37.5	71.5	61.5	102	86	132.5	110.5	162.5	134.5
41.5	37.5	72	62	102.5	86.5	133	111	163	135
42	38	72.5	62.5	103	87	133.5	111.5	163.5	135.5
42.5	38.5	73	63	103.5	87.5	134	111.5	164	135.5
43	39	73.5	63.5	104	87.5	134.5	112	164.5	136
43.5	39.5	74	63.5	104.5	88	135	112.5	165	136.5
44	39.5	74.5	64	105	88.5	135.5	113	165.5	137
44.5	40	75	64.5	105.5	89	136	113.5	166	137.5
45	40.5	75.5	65	106	89.5	136.5	113.5	166.5	137.5
45.5	41	76	65.5	106.5	89.5	137	114	167	138
46	41.5	76.5	65.5	107	90	137.5	114.5	167.5	138.5
46.5	41.5	77	66	107.5	90.5	138	115	168	139
47	42	77.5	66.5	108	91	138.5	115.5	168.5	139.5
47.5	42.5	78	67	108.5	91.5	139	115.5	169	139.5
48	43	78.5	67.5	109	91.5	139.5	116	169.5	140
48.5	43.5	79	67.5	109.5	92	140	116.5	170	140.5
49	43.5	79.5	68	110	92.5	140.5	117	170.5	141
49.5	44	80	68.5	110.5	93	141	117.5	171	141.5
50	44.5	80.5	69	111	93.5	141.5	117.5	171.5	141.5
50.5	45	81	69.5	111.5	93.5	142	118	172	142
51	45.5	81.5	69.5	112	94	142.5	118.5	172.5	142.5
51.5	45.5	82	70	112.5	94.5	143	119	173	143
52	46	82.5	70.5	113	95	143.5	119.5	173.5	143.5
52.5	46.5	83	71	113.5	95.5	144	119.5	174	144.5
53	47	83.5	71.5	114	95.5	144.5	120	174.5	144
53.5	47.5	84	71.5	114.5	96	145	120.5	175	144.5
54	47.5	84.5	72	115	96.5				

NOTE 8.—Published for the Director General of Railroads and filed on one day's notice with the Interstate Commerce Commission under Freight Rate Authority No. 96 of the Director, Division of Traffic, United States Railroad Administration, dated July 11, 1918.

[RE] Indicates reduction.

Only three Supplements to this Tariff will be
 in effect at any time.

I. C. C. No. 8853.

SUPPLEMENT No. 54

(Cancels Supplement No. 63)

(Supplements Nos. 26, 35 and 47 contain all changes from the original tariff that are effective on the date hereof)

TO

TARIFF No. 11877.

U. S. DEPT.
 A. T. & S. F. Ry. San Francisco
 NOV 15 1919

POSTED NOV 15 1919

①Special Supplement.

UNITED STATES RAILROAD ADMINISTRATION,

Director General of Railroads.

The following carriers under Federal control are party to this issue under authority of Appointment Notice No. 3,
 November 29, 1918, filed with the Interstate Commerce Commission by the Director General of Railroads:

Atchison, Topeka & Santa Fe Railway—Coast Lines
Atchison, Topeka & Santa Fe Railway— Santa Fe Prescott &
Grand Canyon Railway Phoenix Lines

LOCAL AND JOINT FREIGHT TARIFF

APPLYING ON

CLASSES AND COMMODITIES

BETWEEN

Stations in New Mexico and Arizona on Atchison, Topeka & Santa Fe Railway—Coast Lines,
 Atchison, Topeka & Santa Fe Railway—Santa Fe Prescott & Phoenix Lines
 and Grand Canyon Railway.

Governed, except as otherwise provided herein, by the Western Classification No. 35, F. W. Gomph, Agent, I. C. C.
 No. 13), supplements thereto and reissues thereof; and by Exception Sheet 1-A (F. W. Gomph, Agent,
 A. T. & S. F. Ry. No. 7185-K, P. F. T. B. Exception Sheet No. 1-F (F. W. Gomph, Agent,
 I. C. C. No. 305), supplements thereto and reissues thereof. (See Note 1.)

NOTE 1.—Exceptions to the current Western Classification on Petroleum Crude Oil and Petroleum Gas Oil, straight carloads,
 also Petroleum Fuel Oil, viz.: Refinery Residuum, straight carloads and Engine (Naphtha) Distillate, carloads, shown in Items 400-A
 and 405-B, or as amended, of A. T. & S. F. Ry. No. 7185-K (Pacific Freight Tariff Bureau Exception Sheet No. 1-F, I. C. C. No. 305
 of F. W. Gomph, Agent), will not apply in connection with rates named herein. Items Nos. 22, 23, 26-A and 572-B herein will apply.

Issued November 6, 1919.

Effective December 15, 1919.

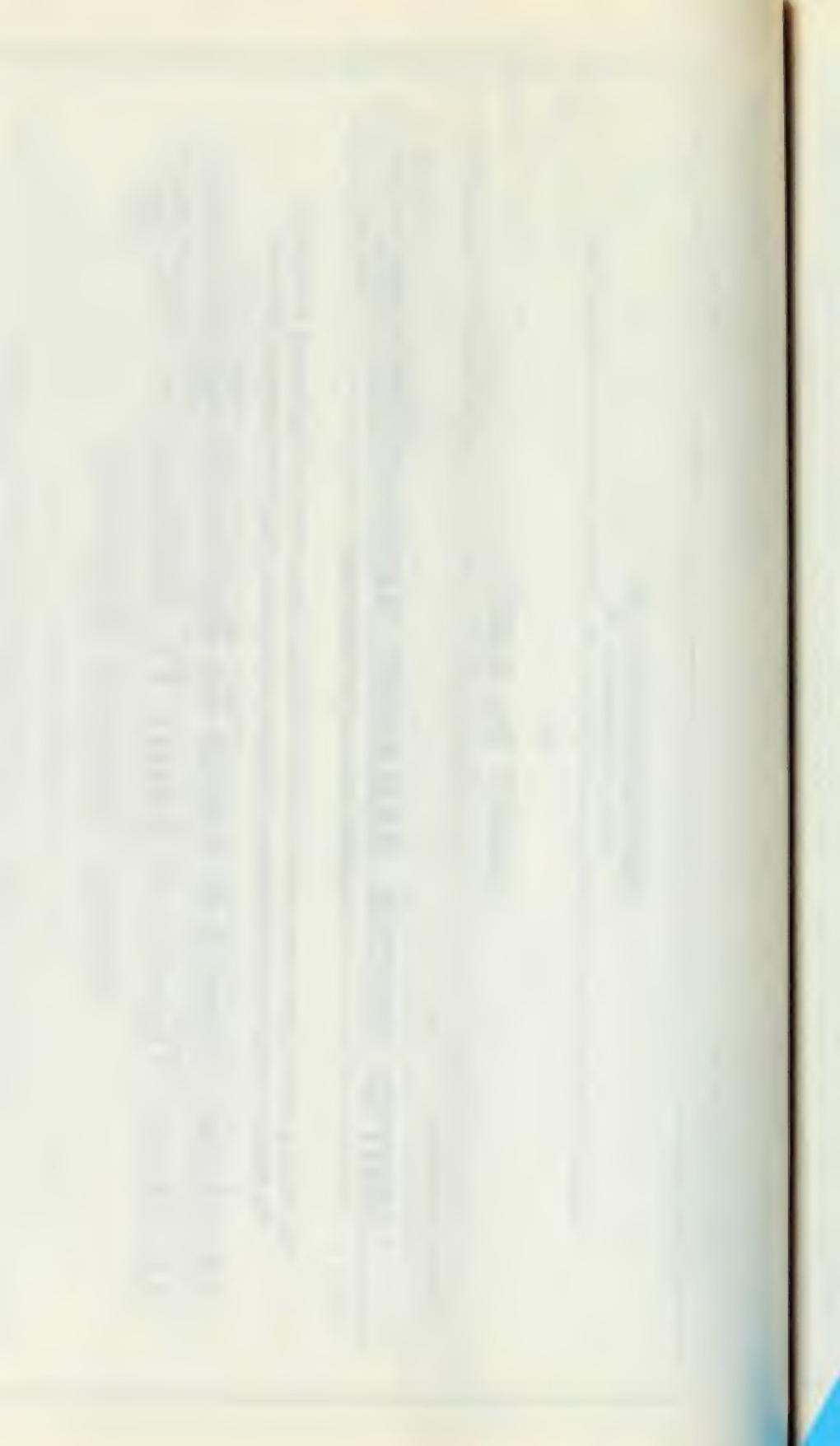
(Except as noted in individual items and on page 7.)

F. B. HOUGHTON,
 F. T. M., A. T. & S. F. Ry.,
 CHICAGO, ILL.

A. M. REINHARDT,
 A. G. F. A., A. T. & S. F. Ry.,
 Grand Canyon Ry.,
 LOS ANGELES, CAL.

W. G. BARNWELL,
 A. F. T. M., A. T. & S. F. Ry.,
 SAN FRANCISCO, CAL.

Issued by
 CHARLES CROSKEY,
 Chief of Tariff Bureau,
 CHICAGO, ILL.



STATION CHANGES.

Index No.	NOW READS:	Index No.	CHANGE TO READ:	DATE EFFECTIVE.	In Supplement No. to I. C. C.
16	Mineral..... Ariz.	16	*Mineral..... Ariz.	Reissue. November 10, 1918...	37
25	*Hualapai..... Ariz.	25	*Walapai..... Ariz.	Reissue. November 10, 1918...	37
80	*Hardy..... Ariz.	80	*Havre..... Ariz.	Reissue. November 10, 1918...	37
121	*Alaska..... N. M.	121	*Acomita..... N. M.	Reissue. November 10, 1918...	37

ADDED STATIONS.

Index No.	NEW STATIONS.	AT SAME RATES AS APPLY TO (OR FROM):	Index No.	DATE EFFECTIVE.	In Supplement No. to I. C. C.	Tariff.
103-A	*McCune..... N. M.	{ *Zuni..... N. M. *Wingate..... N. M.	103 104	Reissue. June 20, 1919....	44	51
103-B	*Sona..... N. M.	(See Item No. 328 on page 7 for rates.)		Reissue. June 20, 1919....	44	51

EXCEPTIONS TO CURRENT WESTERN CLASSIFICATION.

Item No.	COMMODITY.	CLASSIFICATION.
Reissue. Effective August 14, 1919, in Supplement No. 45 to I. C. C. No. 6853; Supplement No. 52 to tariff.		
Scrap Iron, as described under that heading in the current Western Classification, C. L. Min. wt. 30,000 lbs.	L. C. L.	C. L.
NOTE.—Applicable only on the A. T. & S. F. Ry.—S. F. P. & P. Lines (Index Nos. 138 to 216, incl.)		Cancel Item No. 5-B. Class rates apply.

RULES AND REGULATIONS.

REFRIGERATION CHARGES.

ITEM No. 7-A, cancels 7.—Reissue. Effective May 5, 1917, in Supplement No. 28.—The freight rates shown in tariff, or as may be amended, cover the charge for transporting freight only, and do not include charge for any additional service, such as icing, refrigeration, protection of property from frost and freezing, heating, or other such accessory services, unless otherwise specifically provided in tariffs, lawfully on file with the Interstate Commerce Commission and State Commissions.

BASIS FOR MAKING RATES ON PETROLEUM AND PETROLEUM PRODUCTS, CARLOADS.

(See Note 1 on title page; also Item No. 23.)
Item No. 22. Effective December 15, 1919, in Supplement No. 47 to I. C. C. No. 6853; Supplement No. 54 to tariff (see Note 3 below).

Except where lower commodity rates on Petroleum and Petroleum Products classified Fifth Class in the current Western Classification, carloads, are specifically published herein, rates made as provided in the following rules will apply.

(a) Petroleum and Petroleum Products, carloads, classified Fifth Class in current Western Classification, except as otherwise provided in paragraph (b) and (c): Where the Fifth Class rate (disregarding the minimum Fifth Class rate) is the same as the figure shown in Column 1 of Table of Rates, pages 4 and 5, the rate to apply will be made by adding 4½ cents per 100 lbs. to the figure shown opposite in Column 2; Fifth Class rate from point of origin to destination not to be exceeded.

(b) Petroleum Crude Oil and Petroleum Gas Oil, straight carloads, also Petroleum Fuel Oil, viz.: Refinery Residuum, straight carloads: Where the Class "D" rate (disregarding the minimum Class "D" rate) is the same as the figure shown in Column 1 of Table of Rates, pages 4 and 5, the rate to apply will be made by adding 4½ cents per 100 lbs. to the figure shown opposite in Column 2; Fifth Class rate from point of origin to destination not to be exceeded.

(c) (Applies only on Arizona Intrastate Traffic.) Engine (naphtha) Distillate, carloads: Where the Fifth Class rate (disregarding the minimum Fifth Class rate), is the same as the figure shown in Column 1 of Table of Rates, pages 4 and 5, the rate to apply will be made by adding 4½ cents per 100 lbs. to the figure shown opposite in Column 4; Fifth Class rate from point of origin to destination not to be exceeded.

MINIMUM CARLOAD WEIGHT ON PETROLEUM CRUDE OIL, ETC., AND DISTILLATE.

ITEM No. 23.—Effective December 15, 1919, in Supplement No. 47 to I. C. C. No. 6853; Supplement No. 54 to tariff. (Applicable in connection with Items 22, 26-A and 125.)

(a) Petroleum Crude Oil and Petroleum Gas Oil, straight carloads; also Petroleum Fuel Oil, viz.: Refinery Residuum, straight carloads.

(b) Engine (Naphtha) Distillate, carloads on Interstate traffic.

Minimum carload weight in packages 30,000 lbs., in tank cars subject to Rule 32 of current Western Classification except on Arizona Intrastate traffic, the minimum weight for the above commodities in packages is 26,000 lbs.

COMBINATION RATES ON PETROLEUM AND PETROLEUM PRODUCTS, CARLOADS.

(See Note 1 on title page; also Item No. 23.)

ITEM No. 26-A, cancels 26.—Effective December 15, 1919, in Supplement No. 47 to I. C. C. No. 6853; Supplement No. 54 to tariff. Where through rate from point of origin to destination on Petroleum and Petroleum Products, classified Fifth Class in the current Western Classification, carloads, is made by combination of two or more separately established factors, such through rate will be constructed in the following manner:

SECTION 1.

Petroleum and Petroleum Products, classified Fifth Class in current Western Classification, carloads, except as otherwise provided in Sections 2 and 3:

(a) Where the separately established Fifth Class rate (disregarding the minimum Fifth Class rate) is the same as the figure shown in Column 1 of Table of Rates, pages 4 and 5, the factor for basing the through rate will be the figure shown opposite in Column 2.

(b) Where the separately established Commodity Rate is the same as the figure shown in Column 1 of Table of Rates, pages 4 and 5, the factor for basing the through rate will be the figure shown opposite in Column 3.

(c) To the sum of the factors arrived at by use of formula in paragraph (a), or paragraph (b) or paragraphs (a) and (b), add 4½ cents per 100 lbs.; Fifth Class rate from point of origin to destination not to be exceeded.

No Agent. On shipments destined to points prefixed thus (), freight charges must be prepaid. [RE] Indicates reduction.

*Whichever station is the more distant point per paragraphs A and B of intermediate application of tariff, as amended.

*Carload freight only handled. [RE] Indicates change other than advance or reduction.

NOTE 3.—Published for the Director General of Railroads and filed with the Interstate Commerce Commission under Freight Rate Authority No. 96 of the Director, Division of Traffic, United States Railroad Administration, dated July 11, 1918.

RULES AND REGULATIONS—Concluded.**SECTION 2.**

§ Item No. 26-A—Concluded (cancels No. 26).

Petroleum Crude Oil, and Petroleum Gas Oil, straight carloads, also Petroleum Fuel Oil, viz.: Refinery Residuum, straight carloads:

(a) Where the separately established Class "D" rate (disregarding the minimum Class "D" rate) is the same as the figure shown in Column 1 of Table of Rates, pages 4 and 5, the factor for basing the through rate will be the figure shown opposite in Column 2.

(b) Where the separately established Commodity Rate is the same as the figure shown in Column 1 of Table of Rates, pages 4 and 5, the factor for basing the through rate will be the figure shown opposite in Column 3.

(c) To the sum of the factors arrived at by formula in paragraph (a), or paragraph (b), or paragraphs (a) and (b), add 4½ cents per 100 lbs.; Fifth Class rate from point of origin to destination not to be exceeded.

SECTION 3.

Engine (naphtha) Distillate. (Applies only on Arizona Intrastate Traffic.)

(a) Where the separately established Fifth Class rate (disregarding the minimum Fifth Class rate) is the same as the figure shown in Column 1 of Table of Rates, pages 4 and 5, the factor for basing the through rate will be the figure shown opposite in Column 4.

(b) Where the separately established Commodity rate is the same as the figure shown in Column 1 of Table of Rates, pages 4 and 5, the factor for basing the through rate will be the figure shown opposite in Column 3.

(c) To the sum of the factors arrived at by use of formula in paragraph (a), or paragraph (b), or paragraphs (a) and (b), add 4½ cents per 100 lbs.; Fifth Class rate from point of origin to destination not to be exceeded.

RULES FOR CONSTRUCTING COMBINATION RATES ON BRICK, GRAVEL, SAND AND STONE, C. L.

ITEM No. 27-B, cancels 27-A.—Reissue. Effective February 15, 1919 (except as noted), in Supplement No. 40 to I. C. C. No. 6853, Supplement No. 47 to tariff. Rule shown in Special Supplement No. 35 to I. C. C. No. 6853, Supplement No. 42 to tariff, for constructing combination rates on Brick (except Enamored or Glazed), C. L., Sand and Gravel, C. L., Stone, Artificial and Natural, Building and Monumental (except carved, lettered, polished or traced), C. L., Stone, Broken, Crushed and Ground, C. L., and articles taking same rates, or arbitraries over or under same, is cancelled.

Effective December 15, 1919. (See Note 4, below.)

Except as otherwise provided in Item No. 437, rates on **Brick** (except Enamored or Glazed); Clay; Shale; and Clay Products on which rates are the same as or based on arbitraries over the rates on Brick (except enamored or glazed), C. L., Sand and Gravel, C. L., Stone, Artificial and Natural, Building and Monumental (except carved, lettered, polished or traced), C. L., Stone, Broken, Crushed and Ground, C. L., are subject to the rules for constructing combination rates, as provided in "Santa Fe" Tariff No. 12900 (Agent W. J. Kelly's Freight Tariff No. 228, I. C. C. No. U. S. 1), supplements thereto or reissues thereof.

MAXIMUM RATES IN ARIZONA.

ITEM No. 30-A, cancels No. 30.—Reissue. Effective April 14, 1919, in Supplement No. 41 to I. C. C. No. 6853, Supplement No. 48 to tariff. Refer to page 12 of tariff and cancel Item No. 30, relative to maximum rates within Arizona.

MINIMUM RATES AND CHARGES.**Minimum Class Rates in Cents per 100 lbs.**

ITEM No. 33-B, cancels 33-A.—Effective December 15, 1919, in Supplement No. 47 to I. C. C. No. 6853, Supplement No. 54 to tariff. (See Note 3, below.) Rate on any article on which exceptions to Western Classification provide a different rating than as shown in 51 to tariff. Rate on any article on which exceptions to Western Classification provide a different rating than as shown in the Western Classification will be subject to the minimum as provided below for the class provided therefor in the current Western Classification. (See Exception, also Note.)

Exception.—On shipments of Old Wooden Boxes, carloads, minimum weight 12,000 lbs., subject to Rule 6-B of current Western Classification, the minimum class rate will be determined by the use of class "B".

NOTE.—On continuous through movement of freight on which charges are obtained by use of combinations of separately established class rates to and from junction points, the minimum scale of class rates prescribed below shall apply, not in connection with each of the separately established factors but to the total of the combined rates applicable to the through continuous movements.

IN CENTS PER 100 LBS.

CLASSES.	1	2	3	4	5	A	B	C	D	E
Rates.....	25	21	17½	15	*11	12½	9	7½	6½	5

*Rate on Petroleum and Petroleum Products, carloads, made under method provided in Items Nos. 22 and 26-A are not subject to minimum rate of 11 cents, except where 5th Class rate is applied as maximum.

MINIMUM CHARGE ON LESS-THAN-CARLOAD SHIPMENTS.

ITEM No. 35-C, cancels 35-B.—Reissue. Effective March 15, 1919, in Supplement No. 41 to I. C. C. No. 6853, Supplement No. 48 to tariff. The minimum charge on less-than-carload shipments shall be as provided in the current Western Classification, but in no case shall the charge on a single shipment be less than fifty (50) cents. (See Note.)

NOTE.—In case of a continuous through movement of a shipment handled on combination of separate rates the fifty (50) cent minimum herein prescribed does not apply to the separate factors, but to the total of the combined charges.

MINIMUM CHARGE FOR CARLOAD SHIPMENTS.

ITEM No. 40-C, cancels 40-B.—Reissue. Effective June 20, 1919, in Supplement No. 44 to I. C. C. No. 6853, Supplement No. 51 to tariff. The minimum charge for carload shipments will be \$15.00 per car. Does not apply to carload shipments of:

Boxes, Old, Wooden,	Forest Products, viz.:	Waste, consisting of:	Manure,
Brick,	Bark,	Boughs,	Ore,
Cement,	Billets,	Edgings,	Sand and Gravel,
Chert,	Bolts,	Hog Product,	Slag,
Coal,	Logs,	Shingle Tow,	Stone, broken, crushed or ground,
Coke,	Cordwood,	Listings,	Slabs,
	Fuelwood,	Broken Lumber of miscellaneous widths	Sugar Cane,
	Pulpwood,	and lengths but none as long as ten feet.	Water, plain (not flavored or phosphated), other than carbonated.

Above mentioned exceptions to application of \$15.00 per car minimum charge should be interpreted strictly, so as not to include other articles ordinarily grouped with those named.

NOTE.—When the total charges on a continuous through movement of a carload shipment subject to the minimum charge of \$15.00 per car are obtained by combination of separately established rates to and from junction points, the minimum charge of \$15.00 per car prescribed above shall apply, not to each of the separately established rates, but to the total charge made by such combination.

STOPPING IN TRANSIT OF IRON, SCRAP AND JUNK, ETC.

ITEM No. 90-B, cancels 90-A.—Reissue. Effective May 18, 1917, in Supplement No. 29.—Cancel Item (Stopping in Transit of Iron, Scrap and Junk, etc.). No arrangement in effect.

NOTE 3.—Published for the Director General of Railroads and filed with the Interstate Commerce Commission under Freight Rate Authority No. 96, of the Director, Division of Traffic, United States Railroad Administration, dated July 11, 1918. [B]Indicates reduction.

NOTE 4.—Published for the Director General of Railroads and filed on thirty (30) days' notice with the Interstate Commerce Commission under Freight Rate Authority No. 14580, of the Director, Division of Traffic, United States Railroad Administration, dated September 26, 1919. [S]Indicates change other than advance or reduction.

ITEM No. 125.—Effective December 15, 1919, in Supplement No. 47 to I. C. C. No. 8853; Supplement No. 54 to tariff.

TABLE OF RATES ON PETROLEUM AND PETROLEUM PRODUCTS.

(See Items Nos. 22 and 26-A for instructions governing use of this table.)

Column 1	Column 2	Column 3	Column 4	Column 1	Column 2	Column 3	Column 4	Column 1	Column 2	Column 3	Column 4	Column 1	Column 2	Column 3	Column 4
3	2½	.....	2	37½	30	33	24	72	57½	67½	46	106½	85	102	68
3½	3	.....	2½	38	30½	33½	24½	72½	58	68	46½	107	85½	102½	68½
4	3	.....	2½	38½	31	34	25	73	58½	68½	47	107½	86	103	69
4½	3½	.....	3	39	31	34½	25	73½	59	69	47½	108	86½	103½	69½
5	4	.....	3½	39½	31½	35	25½	74	59	69½	47½	108½	87	104	69½
5½	4½	1	3½	40	32	35½	25½	74½	59½	70	47½	109	87	104½	69½
6	5	1½	4	40½	32½	36	26	75	60	70½	48	109½	87½	105	70
6½	5	2	4	41	33	36½	26½	75½	60½	71	48½	110	88	105½	70½
7	5½	2½	4½	41½	33	37	26½	76	61	71½	49	110½	88½	106	71
7½	6	3	5	42	33½	37½	27	76½	61	72	49	111	89	106½	71½
8	6½	3½	5½	42½	34	38	27½	77	62	72½	49½	111½	89	107	71½
8½	7	4	5½	43	34½	38½	27½	77½	62	73	49½	112	89½	107½	71½
9	7	4½	5½	43½	35	39	28	78	62½	73½	50	112½	90	108	72
9½	7½	5	6	44	35	39½	28	78½	63	74	50½	113	90½	108½	72½
10	8	5½	6½	44½	35½	40	28½	79	63	74½	50½	113½	91	109	73
10½	8½	6	7	45	36	40½	29	79½	63½	75	51	114	91	109½	73
11	9	6½	7½	45½	36½	41	29½	80	64	75½	51½	114½	91½	110	73½
11½	9	7	7½	46	37	41½	29½	80½	64½	76	51½	115	92	110½	73½
12	9½	7½	7½	46½	37	42	29½	81	65	76½	52	115½	92½	111	74
12½	10	8	8	47	37½	42½	30	81½	65	77	52½	116	93	111½	74½
13	10½	8½	8½	47½	38	83	30½	82	65½	77½	52½	116½	93	112	74½
13½	11	9	9	48	38½	43½	31	82½	66	78	53	117	93½	112½	75
14	11	9½	9	48½	39	84	31½	83	66½	78½	53½	117½	94	113	75½
14½	11½	10	9½	49	39	44½	31½	83½	67	79	53½	118	94½	113½	75½
15	12	10½	9½	49½	39½	45	31½	84	67	79½	53½	118½	95	114	76
15½	12½	11	10	50	40	45½	32	84½	67½	80	54	119	95	114½	76
16	13	11½	10½	50½	40½	46	32½	85	68	80½	54½	119½	95½	115	76½
16½	13	12	10½	51	41	46½	33	85½	68½	81	55	120	96	115½	77
17	13½	12½	11	51½	41	47	33	86	69	81½	55½	120½	96½	116	77½
17½	14	13	11½	52	41½	47½	33½	86½	69½	82	55½	121	97	116½	77½
18	14½	13½	11½	52½	42	48	33½	87	69½	82½	55½	121½	97	117	77½
18½	15	14	12	53	42½	48½	34	87½	70	83	56	122	97½	117½	78
19	15	14½	12	53½	43	49	34½	88	70½	83½	56½	122½	98	118	78½
19½	15½	15	12½	54	43	49½	34½	88½	71	84	57	123	98½	118½	79
20	16	15½	13	54½	43½	50	35	89	71	84½	57	123½	99	119	79½
20½	16½	13	13½	55	44	50½	35½	89½	71½	85	57½	124	99	119½	79½
21	17	16½	13½	55½	44½	51	35½	90	72	85½	57½	124½	99½	120	79½
21½	17	17	13½	56	45	51½	36	90½	72½	86	58	125	100	120½	80
22	17½	17½	14	56½	45	52	36	91	73	86½	58½	125½	100½	121	80½
22½	18	18	14½	57	45½	52½	36½	91½	73	87	58½	126	101	121½	81
23	18½	18½	15	57½	46	53	37	92	73½	87½	59	126½	101	122	81
23½	19	19	15½	58	46½	53½	37½	92½	74	88	59½	127	101½	122½	81½
24	19½	19½	15½	58½	47	54	37½	93	74½	88½	59½	127½	102	123	81½
24½	19½	20	15½	59	47	54½	37½	93½	75	89	60	128	102½	123½	82
25	20	20½	16	59½	47½	55	38	94	75½	89½	60	128½	103	124	82½
25½	20½	21	16½	60	48	55½	38½	94½	75½	90	60½	129	103	124½	82½
26	21	21½	17	60½	48½	56	39	95	76	90½	61	129½	103½	125	83
26½	21	22	17	61	49	56½	39½	95½	76½	91	61½	130	104	125½	83½
27	21½	22½	17½	61½	49	57	39½	96	77	91½	61½	130½	104½	126	83½
27½	22	23	17½	62	49½	57½	39½	96½	77	92	61½	131	105	126½	84
28	22½	23½	18	62½	50	58	40	97	77½	92½	62	131½	105	127	84
28½	23	24	18½	63	50½	58½	40½	97½	78	93	62½	132	105½	127½	84½
29	23	24½	18½	63½	51	59	41	98	78½	93½	63	132½	106	128	85
29½	23½	25	19	64	51	59½	41	98½	79	94	63½	133	106½	128½	85
30	24	25½	19½	64½	51½	60	41½	99	79½	94½	63½	133½	107	129	85½
30½	24½	26	19½	65	52	60½	41½	99½	79½	95	63½	134	107	129½	85½
31	25	26½	20	65½	52½	61	42	100	80	95½	64	134½	107½	130	86
31½	25	27	20	66	53	61½	42½	100½	80½	96	64½	135	108	130½	86½
32	25½	27½	20½	66½	53	62	42½	101	81	96½	65	135½	108½	131	87
32½	26	28	21	67	53½	62½	43	101½	81	97	65	136	109	131½	87
33	26½	28½	21½	67½	54	63	43½	102	81½	97½	65½	136½	109	132	87
33½	27	29	21½	68	54½	63½	43½	102½	82	98	65½	137	109½	132½	87½
34	27	29½	21½	68½	55	64	44	103	82½	98½	66	137½	110	133	88
34½	27½	30	22	69	55	64½	44	103½	83	99	66½	138	110½	133½	88½
35	28	30½	22½	69½	55½	73	44½	104	83	99½	66½	138½	111	134	89
35½	28½	31	23	70	56	65½	45	104½	83½	100	67	139	111	134½	89
36	29	31½	23½	70½	56½	66	45½	105	84	100½	67½	139½	111½	135	89
36½	29	32	23½	71	57	66½	45½	105½	84½	101	67½	140	112	135½	89½
37	29½	32½	23½	71½	57	67	45½	106	85	101½	68	140½	112½	136	90

INTERSTATE COMMERCE COMMISSION,
Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached (consisting of five typewritten pages) are true copies of the title page and contain true and correct extracts from Tariff Circular No. 18-A, regulations to govern the construction and filing of freight tariffs and classifications and passenger fare schedules approved by the Interstate Commerce Commission February 13, 1911, and now on file and of record in the office of this Commission. I further certify that the rules contained in said extracts were in effect during the period of Federal control, December 28, 1917, and March 1, 1920.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Commission this 14th day of August, A. D. 1925.

(Seal of the Interstate Commerce Commission.)

GEORGE B. McGINTY,

Secretary of the Interstate Commerce Commission.

[228]

DEFENDANTS' EXHIBIT "G."

TARIFF CIRCULAR No. 18-A.

CONTAINS REVISION OF AND CANCELS
TARIFF CIRCULAR 17-A AND SUPPLE-
MENT No. 1. ALSO CANCELS SPECIAL
ORDERS No. 4, No. 7 AND No. 11, AND
SPECIAL CIRCULARS (BUREAU OF
TARIFFS) No. 8 AND No. 9.

INTERSTATE COMMERCE COMMISSION.

Regulations

To Govern the
Construction and Filing of Freight
Tariffs and Classifications and
Passenger Fare Schedules.

ADMINISTRATIVE RULINGS.

REVISED BY ORDER OF COMMISSION.

Approved February 13, 1911. Effective March
31, 1911. (Except as noted in individual items.)

WASHINGTON

GOVERNMENT PRINTING OFFICE.

1911. [229]

Rule 3.

The title page of every tariff shall show:

(a) Name of issuing carrier, carriers, or agent.

Rule 4.

Tariffs in book or pamphlet form shall contain
in the order named:

(b) Names of issuing carriers, including those
for which joint agent issues under power of attor-

ney, and names of carriers participating under concurrence, alphabetically arranged.

(d) An alphabetical index of points from which rates apply, and an alphabetical index of points to which rates apply, together with names of States in which located. When practicable, the index numbers of points and pages upon which rates will be found, or item numbers in which rates from or to such points appear, should be shown. If there be not more than 12 points of origin or 12 points of destination, the name of each may, if practicable, be specified on title-page of tariff.

If a tariff is arranged by groups of origin or destination, by bases, or by bases numbers, the indices must show for each point the proper group, basis, or basis number.

If points of origin or of destination are shown throughout the rate tables in continuous alphabetical order, or are shown alphabetically by States and such States are alphabetically arranged, or are shown by groups alphabetically arranged, no index of points of origin or destination will be required. But when such alphabetical arrangement in rate tables is used the table of contents shall indicate the pages upon which points are so shown, and when arranged by States or groups shall give specific reference to the pages on which rates to or from points in each State or group will be found.

[230]

If a tariff is constructed so as to state rates by groups or bases, and also states specific rates to or from individual points, it shall contain an

alphabetical index of such individual points and also alphabetical lists of the points in such groups, or reference to the I. C. C. number of issue which contains lists of such group points.

Geographical description of application of tariff may be used only when the tariff applies to or from all points in one or more States or Territories or when it applies to or from all points in a State or Territory except those specified. But such list of exceptions for a single State or Territory may not exceed one-third of the number of points in that State or Territory to or from which (as the case may be) the tariff will apply. For example, a tariff may state that it applies from all points in New York, Pennsylvania, and New Jersey, and from all points in Delaware, except (here give alphabetical list of excepted points), and from the following points in Ohio (here alphabetically give list of Ohio points.)

Traffic territorial or group descriptions may be used to designate points to or from which rates named in the tariff apply, provided a complete list of such points arranged by traffic territories or groups is printed in the tariff or specific reference is given to the I. C. C. number of the issue that contains such list. In this list the points in each traffic territorial or group description shall be arranged alphabetically, and the name or names of roads upon which points are located must be shown; or all of the points in traffic territories or groups named in the tariff may be included in one alphabetical index, provided (1) that points of origin

and points of destination are shown separately, alphabetically; (2) that the name or names of roads upon which points are located and the traffic territorial or group description in which they belong are shown opposite the several points. [231]

(h) Rules and regulations which govern the tariff, the title of each rule or regulation to be shown in bold type. Under this head all of the rules, regulations, or conditions which in any way affect the rates named in the tariff shall be entered, except that a special rule applying to a particular rate shall be shown in connection with and on the same page with such rate.

No rule or regulation shall be included which in any way or in any terms authorizes substituting for any rate named in the tariff a rate found in any other tariff or made up on any combination or plan other than that clearly stated in specific terms in the tariff of which the rule or regulation is a part.

* * *

A carrier or an agent may publish, under I. C. C. number, post, and file a tariff publication containing the rules and regulations which are to govern certain rate schedules, and such publication may be made a part of such rate schedules by the specific reference "Governed by rules and regulations shown in — I. C. C. No. —." "When a tariff makes reference to another tariff the I. C. C. number of such other tariff must be given, and when such tariff referred to is the publication of another carrier or an agent, the initials of such other car-

rier or the name of such agent, respectively, must be shown in connection with the I. C. C. number.

A rate schedule may in like manner refer to another schedule for the governing rules and regulations.

A schedule or a publication so referred to must be on file with the Commission and be posted at every place where a schedule that refers to it is posted.

Rule 5.

(a) The practice on part of carriers of accepting and [232] transporting through shipments, as to which no joint rate applies, upon rates made up by combination of the rates of the several carriers participating in the movement, and of collection, as delivering carriers, the aggregate charges of the several carriers upon such shipments, and of accounting to such carriers for their several portions of such charges, is practically universal. That custom has the same binding effect as a joint rate, both as between carriers themselves and as between carriers and shippers. Therefore carriers may construct rates for through shipments to and from points to and from which there is no applicable published joint rate, by using lawfully published and filed bases, locals or proportionals, in connection with other lawfully published and filed tariffs. In making up a combination rate all limitations which a tariff places upon the use of a basing, proportional, or arbitrary rate must be fully observed.

(b) Tariffs containing basing or proportional rates must specify clearly the extent and manner

of their use, and tariffs that are especially intended for use in connection with published basing rates must show the I. C. C. Numbers of tariffs in which bases can be found. * * *

Rule 10.

(a) Each carrier shall publish, with proper I. C. C. numbers post, and file separate tariffs which shall contain in clear, plain, and specific form and terms all the terminal charges and all allowances, such as arbitraries, switching, icing, storage, elevation, diversion, reconsignment transit privileges, and car service, together with all other privileges, charges, and rules, which in any way increase or decrease the amount to be paid on any shipment as stated in the tariff which contains the rate applicable to such shipment, or which increase or decrease the value of the service to the shipper. Such tariffs must stipulate clearly the [233] extent of such privileges and the charges connected therewith, and shall also state whether or not the rate published by the initial carrier from the point of origin to ultimate destination will apply. If the through rate does apply it must be as of the date of shipment from point of origin.

If such privilege is granted or charge is made in connection with the rate under which the shipment moves from point of origin, the initial carrier's tariff which contains such rate must also show the privilege or the charge or must state that shipments thereunder are entitled to such privileges and subject to such charges according to the tariffs of the carriers granting the privileges or perform-

ing the services, as "lawfully on file with the Interstate Commerce Commission." [234]

TARIFF CIRCULAR 18-A—FREIGHT.

4. (i) An explicit statement of the rates, in cents or in dollars and cents, per 100 pounds, per barrel or other package, per ton or per car, together with the names or designation of the places from and to which they apply, all arranged in a simple and systematic manner. Minimum carload weights must be specifically stated. Tariffs containing rates per ton must specify what constitutes a ton thereunder. A ton of 2,000 pounds must be specified as "net ton" or "ton of 2,000 pounds." A ton of 2,240 pounds must be specified a "gross ton," "long ton," or a "ton of 2,240 pounds." Complicated or ambiguous plans or terms must be avoided.

When a classification or exception sheet contains rules under which numerous commodities are classified as taking a percentage of a class rate (for example, rules similar to Rules 25 and 26 of the Official Classification), class-rate tariffs governed by such classification or exception sheet shall show specifically the rates applicable under such rules just as if those rules were additional numbered or lettered classes.

9. (e) Except as authorized in Rules 8 (d), 9 (i), 9 (k), 11, and 12 (d), tariff of less than 5 pages may have no supplement, change therein may be made only by reissue; not more than one supplement may be in effect at any time to a tariff containing 5 and not more than 16 pages; not more than two supplements may be in effect at any time

to a tariff containing 17 and not more than 111 pages; not more than three supplements may be in effect at any time to a tariff containing more than 111 pages, and such third supplement may be issued only when the smaller of the two effective supplements to that tariff contains not less than 10 per centum of the number of pages in the tariff.
[235]

INTERSTATE COMMERCE COMMISSION
Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Telegram dated Merced, Calif., Feb. 20, 1925, addressed to George B. McGinty, Secretary, Interstate Commerce Commission, Washington, D. C.; signed W. L. White,

Telegram dated Washington, D. C., February 21, 1925, addressed to W. L. White, Mgr., Yosemite Valley Railroad Company, Merced, Calif., signed Ulysses Butler, Chief Examiner, and

Letter dated Washington, D. C., February 24, 1925, addressed to Mr. S. G. Casade, Traffic Manager, Standard Oil Company (California), Standard Oil Building, San Francisco, Calif., signed Ulysses Butler, Chief Examiner, in case No. 12890, Standard Oil Company (California) v. Director General, as Agent, Amador Central Railroad Company, et al.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Commission this 14th day of August, A. D. 1925.

(Seal of the Interstate Commerce Commission.)

GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

[Endorsed]: Filed 8/27/25. [236]

DEFENDANTS' EXHIBIT "H."

1925 Feb 20 PM 11 47

Merced Calif 20

George B McGinty

Secretary Interstate Commerce Commission
Washington DC

Refer to report of Commission in docket one two eight nine naught Standard Oil Company of California versus Director General as Agent Amador Central Railroad Company et al decided November eleventh nineteen twenty two report indicates that short line defendants are not responsible and entire reparation due from Director General Stop Order in this case dated December tenth nineteen twenty three names all the short lines defendants together with Director General and appears to direct them to pay the amounts set forth therein to the complainant Stop This company has been made party to a suit in the United States District Court filed by the Standard Oil Company and based on the commissions order in this case Can you explain the apparent discrepancy in the com-

missions decision and order Wire advise my expense

W L WHITE [237]

February 21, 1925

W. L. White,

Mgr. Yosemite Valley Railroad Company,
Merced, Calif.

Your wire twentieth Inclusion of defendants
other than Director General in reparation order in
error Issuance of amended order contemplated

ULYSSES BUTLER

Chief Examiner

COLLECT [238]

JJW-IFH

INTERSTATE COMMERCE COMMISSION

Office of Chief Examiner
Washington.

February 24, 1925

Mr. S. G. Casade, Traffic Manager,
Standard Oil Company (California),
Standard Oil Building,
San Francisco, Calif.

Dear Sir:

The Commission is in receipt of a telegram from Mr. W. L. White, Manager, Yosemite Valley Railroad Company, advising that the Commission's order in docket No. 12890, Standard Oil Company of California v. Director General, as Agent, Amador Central Railroad Company, et al., is in error to the extent it includes the short line carriers involved therein.

An examination of the record and the Commission's opinion discloses that the reparation order in question should have been directed against the Director General solely. This is to advise you that an amended order will be issued in this case in conformity with the opinion at the earliest practicable date.

Very truly yours,
ULYSSES BUTLER.

Copies to:

Mr. John F. Finerty, Assistant General Coun- sel, United States Railroad Administration, Washington, D. C.	Mr. T. J. Day, General Freight Agent, Pacific Electric Rail- way, 670 Pacific Electric Bldg., Los Angeles, Calif.
Mr. W. L. White, Gen'l Mgr., Yosemite Valley Railroad Company, Merced, Calif.	Mr. P. H. Cook, Traffic Manager, Nevada Copper Belt Ry. Co., Mason, Nev.
Mr. F. E. Murphy, Vice Pres., Virginia & Truckee Railway Co., Carson City, Nev.	Messrs. Sanborn Roehl, Nevada-Calif- fornia-Oregon Ry., San Francisco, Calif.
Mr. F. O. Dolson, Vice Pres., Holton Inter- urban Railway, Riverside, Calif.	Mr. D. W. Pontius, Gen'l Mgr., San Diego & Arizona R. R. Co., San Diego, Calif.

It was stipulated that the tariffs naming the rates involved in this case are very voluminous, and that, in order to abridge the record herein, counsel have selected from those tariffs two illustrations which are typical of all the other shipments and tariffs involved, and that Defendant's Exhibits "E" and "F" hereinabove set forth are photographic copies of every page of said illustrative tariffs that have any application.

It was stipulated that the tariffs were in evidence before the Interstate Commerce Commission.

It was further stipulated that there were instances where there were specific commodity rates applicable and in others class rates were applicable; and that petroleum was rated fifth class.

Counsel for defendant, James C. Davis, thereupon moved the Court to strike from the record all reference to shipments that did not move some part of the route listed over the Southern Pacific upon the ground that the only service of process in this case, so far as the Director-General is concerned, was upon the Director-General operating the lines of Southern Pacific Company and that there is not before the Court the Director-General who was operating any of the other railroads over which the shipments moved and that the shipments which did not move over the Southern Pacific lines are not properly in this case. The Court denied the motion, whereupon the defendant Davis duly noted and was allowed an exception.

Thereupon the defendant James C. Davis rested his defense and no other or further evidence was received.

The cause was thereupon orally argued and submitted to the Court upon briefs to be filed, and defendant Davis requested the Court on said submission to make special findings of fact and conclusions of law upon the issues raised by the pleadings. Said briefs having been filed, the cause was duly submitted and thereafter and on the 2d day of August, 1926, the Court filed its [240] opinion herein ordering judgment for plaintiff. On the 7th day of August, 1926, the plaintiff duly served and delivered to the Clerk of said court for the Judge thereof, a draft of its proposed findings of fact and conclusions of law in words and figures as follows: [241]

[Title of Court and Cause.]

DECISION.

This cause came on regularly for trial on the 27th day of August, 1926, before the Court sitting without a jury, a jury having been waived by written stipulation filed by the parties in the above-entitled action; Marshall P. Madison, representing Messrs. Pillsbury, Madison and Sutro, appearing for the plaintiff and J. E. Lyons and Alex M. Bull appearing for the defendant James C. Davis (Director-General of Railroads) as Agent, for whom the defendant Andrew W. Mellon (Director-General of Railroads) as Agent has been substituted. Evi-

dence both oral and documentary were introduced, and thereupon the cause was submitted to the Court for its decision, and now the Court being fully advised in the premises, and after having fully considered said evidence, makes the following findings of fact and conclusions of law, to wit:

FINDINGS OF FACT.

I.

That the rates on file with the Interstate Commerce Commission, as of June 24, 1918, from and to the following points, [242] were as follows:

From	To	Rate	Commodity
Rochester, N. Y.	Colfax, Wash.	\$1.28	Petroleum Products
El Segundo, Cal.	Holtville, Cal.	.63½	Petroleum Products
El Segundo, Cal.	Holtville, Cal.	.51½	Engine (Naphtha) Distillate
Ardmore, Okla.	Holtville, Cal.	1.11½	Gasoline
Dallas, Tex.	Holtville, Cal.	1.11½	Gasoline
Harrys, Tex.	Holtville, Cal.	1.11½	Gasoline
Cushing, Okla.	Holtville, Cal.	1.11½	Gasoline
Ardmore, Okla.	Calexico, Cal.	1.01½	Petroleum Products
Rochester, N. Y.	Willbridge, Ore.	1.28	Petroleum Products
Salt Lake City, Utah	Yerington, Nev.	1.10½	Petroleum Products
Ardmore, Okla.	Yerington, Nev.	1.25½	Gasoline
Richmond, Cal.	Yerington, Nev.	.84	Petroleum Products
Salt Lake City, Utah	Carson City, Nev.	.96½	Petroleum Products
Richmond, Cal.	Carson City, Nev.	.70	Petroleum Products
Sugar Creek, Mo.	Carson City, Nev.	1.09½	Petroleum Products

From	To	Rate	Commodity
Salt Lake City, Utah	Alturas, Cal.	1.20 $\frac{1}{2}$	Petroleum Products
Richmond, Cal.	El Portal, Cal.	.63 $\frac{1}{2}$	Petroleum Products
Richmond, Cal.	El Portal, Cal.	.42 $\frac{1}{2}$	Engine (Naphtha) Distillate
El Segundo, Cal.	Palm City, Cal.	.22	Engine (Naphtha) Distillate
El Segundo, Cal.	Palm City, Cal.	.25	Petroleum Products
El Segundo, Cal.	Santee, Cal.	.28 $\frac{1}{2}$	Petroleum Products
El Segundo, Cal.	Santee, Cal.	.24	Engine (Naphtha) Distillate
Richmond, Cal.	Martell, Cal.	.25 $\frac{1}{2}$	Engine (Naphtha) Distillate
Richmond, Cal.	Martell, Cal.	.30 $\frac{1}{2}$	Petroleum Products
Ardmore, Okla.	Clarkdale, Ariz.	1.15 $\frac{1}{2}$	Gasoline
Ardmore, Okla.	Humboldt, Ariz.	1.08 $\frac{1}{2}$	Gasoline
Wichita Falls, Tex.	Humboldt, Ariz.	1.08 $\frac{1}{2}$	Gasoline
Fort Worth, Tex.	Clarkdale, Ariz.	1.15 $\frac{1}{2}$	Gasoline

increased four and one-half cents for the through continuous movement.

II.

That in amending the tariffs of rates on petroleum and petroleum products as set forth in plaintiff's petition to make effective the four and one-half cent advance referred to in paragraphs V and VI of said petition, the carriers under federal control included in their tariffs a provision to the effect that when the charges on a continuous through movement are obtained by the combination of separately established rates, the increase of four and one-half cents per hundred pounds will apply as to the total of such combined rates in effect June 24, 1918 (some tariffs provided May 25, 1918), fifth class rates as increased June 25, 1918 not to be exceeded, and to the effect that said increase of four and one-half cents per hundred pounds would not apply to each separately established rate.
[243]

III.

That the shipments made by plaintiff referred to in said petition were made pursuant to and in reliance upon the tariffs referred to in paragraphs V to VII inclusive in said petition and particularly in reliance upon the provision referred to in the foregoing finding. That the rates charged and assessed by the defendant James C. Davis (Director-General of Railroads) as Agent, for whom the defendant Andrew W. Mellon (Director-General of Railroads) as Agent, has been substituted, for transporting the shipments of plaintiff

hereinabove set forth, were in excess of the lawful rates provided in said tariff, and more particularly of the provision in the foregoing finding referred to, in that the four and one-half cent advance was applied by the defendant James C. Davis (Director-General of Railroads) as Agent, for whom the defendant Andrew W. Mellon (Director-General of Railroads) as Agent, has been substituted, upon each separate factor contained in the combination of factors making the rate for the continuous through movement for the particular shipment in question in some cases, and in other cases the four and one-half cent advance was applied on one factor and a twenty-five per cent advance was applied on the other factor contained in the combination of factors making the rate for the continuous through movement for the particular shipment in question, and said advances were not limited to a single four and one-half cent advance on the rate for the continuous through movement made from the combination of factors. That said charges were paid and borne by plaintiff herein.

IV.

That by reason of the facts contained in the foregoing finding, plaintiff was subjected to the payment of rates and charges for the transportation of the shipments referred to in said petition, which said rates were, when exacted, in excess of the legally published rates and charges, in violation of Section 1 [244] and Section 6 of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof and supplementary

thereto, and in violation of Section 10 of the Federal Control Act, and plaintiff was damaged thereby in the sum of \$6,659.33, together with interest thereon at the rate of six per cent (6%) per annum.

V.

That five hundred dollars (\$500) is a reasonable attorney's fee for the prosecution of this action.

VI.

That on the 16th day of January, 1924, the Yosemite Valley Railroad Company, one of the defendants named in the original order of the Interstate Commerce Commission hereinabove referred to, and subsequent to the making of such order, wrote a letter to the Interstate Commerce Commission inquiring as to the proper construction of said order and implying that it should be construed so as to relieve the said Yosemite Valley Railroad Company and other short lines named therein from paying any award thereunder, notwithstanding that the order so stated by its terms.

VII.

That under date of February 12, 1924, the Chief Examiner of said Interstate Commerce Commission advised the said Yosemite Valley Railroad Company that the interpretation of said order contended for and sought for by the said Yosemite Valley Railroad Company was correct, and that it was the true and proper construction of the award notwithstanding the statements contained therein. That subsequent thereto and on or about the 23d day of February, 1925, the said Yosemite Valley

Railroad Company sent a telegram to the said Chief Examiner of said Interstate Commerce Commission advising him that said order was erroneous and that it should be worded so as to clearly set forth that the Director-General alone was liable to pay the award and that the said Yosemite Valley Railroad Company and the other short lines were not liable to pay the award, and thereafter and in response thereto and under date [245] of February 24, 1925, the Chief Examiner of said Interstate Commerce Commission advised this plaintiff, said Director-General and all the carriers named in the original order, that an amended order would be issued in conformity with the application of said Yosemite Valley Railroad Company.

From the foregoing facts the Court finds the following conclusions of law:

CONCLUSIONS OF LAW.

Plaintiff is entitled to judgment against the defendant Andrew W. Mellon (Director-General of Railroads) as Agent, substituted for James C. Davis (Director-General of Railroads) as Agent, as follows: \$590.47 with interest from November 1, 1919, at 6% per annum; \$79.34 with interest from May 15, 1919, at 6% per annum; \$2149.59 with interest from January 15, 1919, at 6% per annum; \$152.05 with interest from March 22, 1920, at 6% per annum; \$923.46 with interest from April 1, 1919, at 6% per annum; \$420.11 with interest from November 15, 1919, at 6% per annum; \$447.90

with interest from January 15, 1919, at 6% per annum; \$968.18 with interest from May 1, 1919, at 6% per annum; \$928.23 with interest from July 1, 1919, at 6% per annum; together with an attorney's fee of \$500 to be taxed as costs, and together with costs to be taxed.

Dated: San Francisco, California, August —, 1926.

District Judge. [246]

Thereafter and on the 2d day of September, 1926, and within the time allowed by order of Court and the stipulation of the parties, the defendant Mellon (having been duly substituted for defendant Davis) duly served and delivered to the Clerk of said court for the Judge, his request for special findings of fact and conclusions of law; and specific objections to special findings and conclusions requested by plaintiff, in words and figures as follows: [247]

[Title of Court and Cause.]

**DEFENDANT'S REQUEST FOR SPECIAL
FINDINGS OF FACT AND CONCLUSIONS
OF LAW; AND OBJECTIONS TO SPECIAL
FINDINGS OF FACT AND CONCLUSIONS
OF LAW REQUESTED BY PLAINTIFF.**

The defendant, Andrew W. Mellon (Director-General of Railroads) as Agent, considering the facts hereinafter set forth to be proven and the following conclusions of law justified, hereby respect-

fully requests the Court to find and conclude as follows:

FINDINGS OF FACT.

1. The petition in this case was not served upon the Director-General of Railroads as Agent against whom causes of action may be brought arising out of the operation of the lines of the Atchison, Topeka & Santa Fe Railway Company.

2. The only service in this case was upon the Director-General as a party against whom suits may be brought for causes of action arising out of the operation or control by the President of the lines of the Southern Pacific Company. [248]

3. The rate from Ardmore, Okla., to Holtville, Cal., as actually published in the tariffs on file with the Interstate Commerce Commission was \$1.16 per 100 pounds, being a combination of 94½ cents from Ardmore to Grape, Cal., published in Agent Countiss' Tariff I. C. C. 1067, 9 cents from Grape to El Centro, Cal., published in Southern Pacific Tariff I. C. C. No. 4067, and 12½ cents from El Centro to Holtville, published in Holton Interurban Tariff I. C. C. No. 13 (this was used in the record as typical of the rates where one of the lines over which the shipments moved was not under federal control).

4. The rate from Ardmore, Okla., to Clarkdale, Ariz., as actually published in the tariffs on file with the Interstate Commerce Commission was \$1.20 per 100 pounds, being a combination of 94½ cents from Ardmore to Cedar Glade, Ariz., published in Agent Countiss' Tariff I. C. C. No. 1048,

and 25½ cents from Cedar Glade to Clarkdale as published in Atchison, Topeka & Santa Fe Railway Tariff I. C. C. No. 6853 (this was used in the record as typical of rates where all lines over which shipments moved were under federal control).

5. Rule 3 of Tariff Circular 18-A of the Interstate Commerce Commission requires that every tariff shall show the name of the issuing carrier, carriers or agent.

6. Rule 4-b of Tariff Circular 18-A of the Interstate Commerce Commission requires that every tariff shall contain the names of the issuing carriers and the names of the participating carriers.

7. Rule 4-d of Tariff Circular 18-A of the Interstate Commerce Commission requires that every tariff shall contain an alphabetical index of the points from and to which the rates apply together with the names of the states in which located.

8. Rule 4-h of Tariff Circular 18-A of the Interstate [249] Commerce Commission requires that all rules, regulations or conditions which in any way affect the rates named in the tariff shall be shown, and that no rule or regulation shall be included which in any way substitutes for any rate in the tariff a rate found in any other tariff or made up on any combination or plan other than that clearly stated in specific terms in the tariff of which the rule and regulation is a part, except that a rule and regulation in another tariff be made a part of such rate schedule by specific reference "governed by rules and regulations shown in— I. C. C. No. —," and that when a tariff makes

reference to another tariff the I. C. C. number of such other tariff must be given, and when such tariff referred to is the publication of another carrier or an agent, the initials of such other carrier or name of such agent respectively must be shown in connection with the I. C. C. number.

9. Rule 5-b of Tariff Circular 18-A of the Interstate Commerce Commission requires that tariffs containing basing or proportional rates must specify clearly the extent and manner of their use and the tariffs that are specially intended for use in connection with published basing rates must show the I. C. C. number of the tariff in which the bases can be found.

10. The Interstate Commerce Commission did not authorize the Director-General of Railroads to waive any of its tariff rules except rule 4-i of Circular 18-A (which requires an explicit statement of rates) and rule 9-e of Circular 18-A (which limits the number and size of effective supplements to any tariff).

11. Atchison, Topeka & Santa Fe Railway Tariff I. C. C. 6853 is limited by its terms to apply only between Cedar Glade, Ariz., and Clarkdale, Ariz. (in so far as this particular case is concerned).

12. Southern Pacific Tariff I. C. C. 4067 is limited by its terms to apply only between Grape Cal. and El Centro, Cal. (in so far as the shipments in this case are concerned). [250]

13. The shipments from Ardmore, Okla., to Holtville, Cal., moved over the Gulf, Colorado & Santa Fe, the Chicago, Rock Island & Pacific, the Chicago,

Rock Island & Gulf, the El Paso & Southwestern, the Southern Pacific and the Holton Interurban Railway.

14. The shipments from Ardmore, Okla., to Humboldt, Ariz., moved over the Gulf, Colorado & Santa Fe and the Atchison, Topeka & Santa Fe.

15. The shipments from Ardmore, Okla., to Clarkdale, Ariz., moved over the Gulf, Colorado & Santa Fe and the Atchison, Topeka & Santa Fe.

16. The shipments from Wichita Falls, Tex., to Humboldt, Ariz., moved over the Wichita Valley, Texas & Pacific and Atchinson, Topeka & Santa Fe.

17. The other lines over which the shipments from Ardmore, Okla., and Wichita Falls, Texas, to Clarkdale, and Humboldt, Ariz., are not named as participating carriers in Atchison, Topeka & Santa Fe tariff I. C. C. N. 6853 which published the combination rule and the rate from Cedar Glade, Ariz., one factor used in making the combination rate.

18. Other lines over which the shipments moved from Ardmore, Okla., to Holtville, Cal., are not named as participating carriers in Southern Pacific Tariff I. C. C. No. 4067 which published the combination rule and the rate from Grape, Cal., to El Centro, Cal., one factor used in making the combination rate.

19. Agent Countiss' Tariff I. C. C. No. 1067 does not contain a combination rule and makes no reference to Southern Pacific Tariff I. C. C. No. 4067 (the tariff containing the combination rule and used as typical).

20. Holton Interurban Tariff I. C. C. 13 does not contain a combination rule and makes no reference to Southern Pacific Tariff I. C. C. No. 4067.
[251]

24. Agent Countiss' Tariff I. C. C. No. 1048 does not contain a combination rule and makes no reference to Atchison, Topeka & Santa Fe tariff I. C. C. No. 6853.

22. In no instance were all lines handling the shipments parties to the tariff carrying the combination rule.

23. In no instance was there a cross reference to the tariff publishing the combination rule.

24. The Amador Central Railroad Company, Holton Interurban Railway Company, Nevada Copper Belt Railroad Company, Nevada-California-Oregon Railway, Pacific Electric Railway Company, Virginia & Truckee Railway, San Diego & Arizona Railway Company and Yosemite Valley Railroad Company were not under federal control during the time covered by this suit.

25. On January 16, 1924, the Yosemite Valley Railroad, one of the defendants named in the original order of the Interstate Commerce Commission, wrote a letter to said Commission asking if it was correct in its understanding that the Yosemite Valley Railroad was not required by the decision to pay any overcharge that might exist and that the entire amount mentioned in the order was to be paid by the Director-General.

On February 12, 1924, the Chief Examiner replied that from the language of the report it ap-

peared that the Director-General should pay the entire amount of the order.

On February 20, 1925, the Yosemite Valley Railroad telegraphed the Chief Examiner that report of commission indicated short lines not responsible and entire reparation due from Director-General, but that order was directed against all defendants and calling attention to fact suit had been entered. The telegram asked explanation of apparent discrepancy between decision and order.

On February 21, 1925, the Chief Examiner replied that inclusion of other defendants than Director-General in order was in error and issuance of amended order was contemplated. [252]

On February 24, 1925, the Chief Examiner wrote the interested parties that order was in error in including short lines and that an amended order would be issued in conformity with the opinion.

Upon the foregoing findings of fact the Court decides, as

CONCLUSIONS OF LAW.

- a. This suit is barred by the statute of limitations.
- b. Plaintiff cannot recover because the Director-General as Agent of all lines participating in the transportation was not served.
- c. Even if the order of the commission is valid, plaintiff is not entitled to recover any sum but \$4,293.59 with interest, that being the reparation on the shipments which moved in connection with the Southern Pacific Company.

d. The findings of fact of the commission do not support the order because the findings are that there was a holding out of a method of constructing a through rate which must be protected whereas the order awards reparation on account of over-charges. An overcharge is a charge collected in excess of the legal tariff charge.

e. The legal rate from Ardmore, Okla., to Clarkdale was \$1.20 per 100 pounds, being a combination of 94½ cents from Ardmore to Cedar Glade, Ariz., published in Agent Countiss' Tariff I. C. C. No. 1048, and 25½ cents from Cedar Glade to Clarkdale as published in Atchison, Topeka & Santa Fe Tariff I. C. C. No. 6853 (this was used in the record as typical of instances where all lines over which shipments moved were under federal control).

f. The legal rate from Ardmore, Okla., to Holtville, Cal., was \$1.16 per 100 pounds being a combination of 94½ cents from Ardmore, to Grape, Cal., published in Agent Countiss' Tariff I. C. C. [253] No. 1067, 9 cents from Grape to El Centro, Cal., published in Holton Interurban Tariff I. C. C. No. 13 (this was used in the record as typical of the cases where one of the lines over which the shipments moved was not under federal control).

g. The tariff cannot be extended beyond its territorial limits except by specific cross reference as required by the rules of the commission and the law.

h. Rules 3, 4 and 5 of Tariff Circular 18-8 are mandatory and could not be waived by the commission.

- i. Tariffs must state plainly the places between which the property will be carried.
- j. Tariffs must show the rates applying between the points shown therein and all rules and regulations which in any way change or effect the rates.
- k. The names of all carriers parties to any tariffs must be shown therein.
- l. No carrier can participate in the transportation unless it is shown as party to the tariff.
- m. Shippers are conclusively presumed to know the legal rates.
- n. The Director-General cannot hold out any rate which is not actually published in the tariff.
- o. The Director-General cannot hold out any method of constructing a rate other than that legally published in the tariff.
- p. The Director-General cannot protect any rate or method of making rates other than those actually published in the tariff.
- q. Atchison, Topeka & Santa Fe Tariff I. C. C. 6853 did not hold out any method of constructing through rates from Ardmore, Okla., and Wichita Falls, Texas, to Clarkdale and Humboldt, Ariz.
- r. Southern Pacific Tariff I. C. C. 4067 did not hold out any method of constructing a through rate from Ardmore, Okla., to Holtville, Cal. [254]
- s. Plaintiff is not entitled to recover because he has not proved any damage due to any holding out by the defendant that rates made by the use of the combination rule would be protected.
- t. This is a suit against the United States.
- u. Plaintiff is not entitled to recover costs.

- v. Plaintiff is not entitled to recover attorney's fees.
- w. The order of commission is unlawful and void.
- x. The legally published rate must be applied.
- y. No rate can be applied except that published in the tariffs lawfully on file with the Interstate Commerce Commission.
- z. Plaintiff is not entitled to a judgment in any amount.
- aa. The judgment should be for defendant.

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

I. Plaintiff's proposed finding No. I is objected to on the ground that all the tariffs containing the rates between the points involved and upon the commodities named are not in evidence and said proposed finding is not supported by the evidence; also because it fails to show the routing of the shipments involved or any of them and fails to show which lines of railroad were under federal control and which were not, the evidence showing that some of the lines of railroad over which the shipments were routed were under federal control at time of shipment and some were not. Certain rates and tariffs were named in the evidence as typical and, for this reason, the finding on this request should be confined to the typical illustrations in evidence. The rates charged can be obtained from Complainant's Exhibits No. 1 to 17, inclusive, before the In-

terstate Commerce Commission, but they were not in all cases the legal rates. There is nothing in the record from which the legal rates on all the [255] shipments can be obtained.

Defendant moves to substitute paragraphs 3 and 4 and 13 to 24 inclusive of his proposed findings of fact in lieu of paragraph I of plaintiff's proposed findings of fact.

II. Objection is made to plaintiff's proposed finding No. II because it contains mixed findings of fact and conclusions of law, contrary to the requirements of Rule 95, in that it purports to state the "effect" of certain tariff provisions instead of the provisions themselves; also because the purported facts and conclusions are contrary to the evidence and law and not supported thereby. The evidence is that all lines under federal control were not parties to the tariffs which published the combination rule and in no instance did such tariffs provide "to the effect that said increase of four and one-half cents per hundred pounds would not apply to each separately established rate," or to any similar effect.

Defendant moves to substitute his proposed findings Nos. 13 to 24 inclusive, in lieu of plaintiff's requested and proposed finding No. II.

III. Plaintiff's proposed finding No. III is objected to because it violates the provisions of Rule 95 by mixing proposed findings of fact with conclusions of law which are contrary to law (said conclusion being that the rates charged were in excess of the lawful rates provided in the tariffs)

said purported finding being unsupported by and contrary to the evidence and law; also because the proposed finding "that the shipments made by plaintiff referred to in said petition were made pursuant to and in reliance upon the tariffs referred to in paragraph V to VI inclusive in said petition and particularly in reliance upon the provision referred to in the foregoing finding," is not supported by the evidence; also because it cannot be told or ascertained what specific tariffs or rates are referred to therein; and also because the evidence shows [256] that the rates assessed were not in excess of the lawful rates provided in the applicable tariffs.

Defendant moves to substitute his proposed findings Nos. 5 to 24 inclusive, in lieu of plaintiff's proposed finding No. III.

IV. Objection is made to plaintiff's proposed finding No. IV because it contains mixed findings of fact and conclusions of law contrary to the provisions of Rule 95, said conclusion being that "said rates were, when exacted, in excess of the legally published rates and charges, in violation of Section 1 and Section 6 of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto, and in violation of Section 10 of the Federal Control Act"; also because said conclusion is not justified by the ultimate facts set forth in defendant's proposed findings Nos. 5 to 24 inclusive, and is contrary to law. Defendant also objects to the proposed finding that "plaintiff was damaged thereby in

the sum of \$6,659.33, together with interest thereon at the rate of six per cent per annum," because it assumes that the rates assessed were in excess of the lawful tariff which is contrary to the evidence and unsupported thereby.

V. Objection is made to Paragraph V of plaintiff's proposed findings of fact because the defendant, in his representative capacity as Agent of the government of the United States, is not liable for any attorney fees.

VI and VII. Objection is made to Paragraphs VI and VII of plaintiff's proposed findings because they are not supported by the evidence, and because they contain mixed findings of fact and conclusions of law contrary to the provisions of Rule 95, in that they purport to place a construction on the correspondence referred to instead of stating the substance of the contents.

Defendant moves to substitute his requested finding No. 25 for plaintiff's requested findings Nos. VI and VII. [257]

Defendant also objects to plaintiff's proposed conclusions of law as set forth on page 5 of plaintiff's proposed findings of fact and conclusions of law on the ground that the same are erroneous and contrary to law and not supported by the evidence stated in defendant's proposed findings of fact hereinabove set forth.

Defendant moves to substitute his requested and proposed conclusions of law hereinabove set forth in lieu of those proposed by plaintiff.

Defendant respectfully requests the Court if any of his objections to plaintiff's proposed findings of fact or conclusions of law are overruled in the absence of his counsel herein or if any of defendant's proposed findings of fact and conclusions of law are rejected, that specific exception be allowed defendant to each and all of such findings or conclusions and to the failure to find and conclude as requested by defendant.

Respectfully submitted,

ALEX M. BULL,

JAMES E. LYONS,

Attorneys for Defendant, Andrew W. Mellon (Director-General of Railroads) as Agent. [258]

On the 6th day of October, 1926, the matter of the settlement of said proposed findings and conclusions came on regularly for hearing before the Judge of said court and was argued orally by Marshall P. Madison, Esq., for the plaintiff, and by J. E. Lyons, Esq., for the defendant Mellon, and submitted. Whereupon the Court declined in whole or in part to find or conclude as requested by defendant Mellon and overruled all of said defendant's objections to plaintiff's requested findings and conclusions and to each of them and ordered the findings and conclusions requested by plaintiff to be settled and allowed as signed and filed herein on the 11th day of October, 1926. That the defendant Mellon duly noted and was allowed an exception to all and each of plaintiff's findings and conclusions and to the failure of the Judge to find and conclude as requested by said defendant, and

defendant was allowed an exception to the order overruling each of his objections to each of plaintiff's proposed findings and conclusions.

On the 11th day of October, 1926, and in the absence of the parties, judgment was entered herein in favor of plaintiff and against the defendant Mellon as follows: For the sum of \$590.47 with interest from November 1, 1919, at 6% per annum; \$79.34 with interest from May 15, 1919, at 6% per annum; \$2,149.59 with interest from January 15, 1919, at 6% per annum; \$152.05 with interest from March 22, 1920, at 6% per annum; \$923.46 with interest from April 1, 1919, at 6% per annum; \$420.11 with interest from November 15, 1919, at 6% per annum; \$447.90 with interest from January 15, 1919, at 6% per annum; \$968.18 with interest from May 1, 1919, at 6% per annum; \$928.23 with interest from July 1, 1919, at 6% per annum; together with an attorney's fee of \$500.00 to be taxed as costs, and together with its costs herein expended, taxed at \$28.60; to which judgment and the whole thereof said defendant Mellon duly [259] noted and was allowed an exception.

Within the time allowed by law this bill of exceptions was served on counsel for plaintiff and was filed herein.

WHEREUPON, the Court being willing to preserve the record in order that its ruling be reviewed for error, if any there be, hereby certifies that the foregoing bill of exceptions contains all of the evidence admitted upon the trial of said cause, together with the rulings of the Court thereon and the

rulings of the Court admitting testimony at said trial and the exceptions taken and allowed to such rulings; and also contains a true transcript of the proceedings upon the settlement of the findings of fact and conclusions of law and of the rulings of the Court upon such settlement and the exceptions allowed thereon and to the judgment entered upon the Court's findings and conclusions.

WHEREUPON, said bill of exceptions is hereby settled, certified and signed this 22 day of November, 1926, as correct in all respects and presented in due time.

A. F. ST. SURE,
United States District Judge.

**STIPULATION FOR STATEMENT OF BILL
OF EXCEPTIONS.**

It is hereby stipulated that the foregoing bill of exceptions is correct and may be settled, allowed, certified and signed by the Court without amendment.

Dated: San Francisco, Calif., this 16th day of November, 1926.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.
ALEX. M. BULL,
JAMES E. LYONS,
Attorneys for Defendant, Mellon.

[Endorsed]: Filed Nov. 22, 1926. [260]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

To the Honorable A. F. ST. SURE, Judge Presiding, and to the Judges of the above-entitled court:

Now comes Andrew W. Mellon (Director-General of Railroads), as Agent of the President under the provisions of Section 206 of the Transportation Act, 1920, successor to and substituted for James C. Davis, one of the defendants in the above-entitled action, by Alex M. Bull and James E. Lyons, his attorneys, and shows:

That on the 11th day of October, 1926, the above-entitled court entered a judgment herein in favor of plaintiff and against your petitioner and defendant Andrew W. Mellon (Director-General of Railroads), as Agent of the President under the provisions of Section 206 of the Transportation Act, 1920, in which judgment and proceedings prior thereto in this cause certain errors were committed to the prejudice of said defendant, all of which will more in detail appear from the assignment of errors filed with this petition.

WHEREFORE, said defendant prays that a writ of error may issue in his behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the United [261] States Circuit Court of Ap-

peals for the Ninth Circuit and that such other and further proceedings be had as may be proper in the premises.

Dated: San Francisco, California, this 22d day of November, 1926.

ALEX M. BULL,
Hurley Wright Bldg., Washington, D. C.,
JAMES E. LYONS,
65 Market St., San Francisco, California,
Attorneys for Defendant, Andrew W. Mellon.

Receipt of the within petition for writ of error is admitted this 22d day of November, 1926.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 22, 1926. [262]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Now comes Andrew W. Mellon (Director-General of Railroads) as Agent, substituted for James C. Davis (Director-General of Railroads) as Agent, one of the defendants in the above-entitled action, and in connection with his petition for writ of error makes the following assignments of error which he avers occurred upon the trial of said cause, or were committed by the Court in the findings of fact and conclusions of law and in the rendition of judgment and proceedings prior thereto, to wit:

1. The Court erred in overruling the demurrer of the defendant Davis to the petition or complaint.
2. The Court erred in denying the motion of the defendant Davis to dismiss.
3. The Court erred in finding the following fact, which was requested by plaintiff, to wit:

"That the rates on file with the Interstate Commerce Commission, as of June 24, 1918, from and to the following points, were as follows: [263]

From	To	Rate	Commodity
Rochester, N. Y.	Colfax, Wash.	\$1.28	Petroleum Products
El Segundo, Cal.	Holtville, Cal.	.63½	Petroleum Products
El Segundo, Cal.	Holtville, Cal.	.51½	Engine (naphtha) Distillate
Ardmore, Okla.	Holtville, Cal.	1.11½	Gasoline
Dallas, Tex.	Holtville, Cal.	1.11½	Gasoline
Harrys, Tex.	Holtville, Cal.	1.11½	Gasoline
Cushing, Okla.	Holtville, Cal.	1.11½	Gasoline
Ardmore, Okla.	Calexico, Cal.	1.01½	Petroleum Products
Rochester, N. Y.	Willbridge, Ore.	1.28	Petroleum Products
Salt Lake City, Utah	Yerington, Nev.	1.10½	Petroleum Products
Ardmore, Okla.	Yerington, Nev.	1.25½	Gasoline
Richmond, Cal.	Yerington, Nev.	.84	Petroleum Products
Salt Lake City, Utah	Carson City, Nev.	.96½	Petroleum Products
Richmond, Cal.	Carson City, Nev.	.70	Petroleum Products
Sugar Creek, Mo.	Carson City, Nev.	1.09½	Petroleum Products

From	To	Rate	Commodity
Salt Lake City, Utah	Alturas, Cal.	1.20½	Petroleum Products
Richmond, Cal.	El Portal, Cal.	.63½	Petroleum Products
Richmond, Cal.	El Portal, Cal.	.42½	Engine (naphtha) Distillate
El Segundo, Cal.	Palm City, Cal.	.22	Engine (naphtha) Distillate
El Segundo, Cal.	Palm City, Cal.	.25	Petroleum Products
El Segundo, Cal.	Santee, Cal.	.28½	Petroleum Products
El Segundo, Cal.	Santee, Cal.	.24	Engine (naphtha) Distillate
Richmond, Cal.	Martell, Cal.	.25½	Engine (naphtha) Distillate
Richmond, Cal.	Martell, Cal.	.30½	Petroleum Products
Ardmore, Okla.	Clarkdale, Ariz.	1.15½	Gasoline
Ardmore, Okla.	Humboldt, Ariz.	1.08½	Gasoline
Wichita Falls, Tex.	Humboldt, Ariz.	1.08½	Gasoline
Fort Worth, Tex.	Clarkdale, Ariz.	1.15½	Gasoline

increase four and one-half cents for the through continuous movement,"

which is contained in Paragraph I of the findings of fact requested by plaintiff and in Paragraph I of the findings of fact of the Court, for the reason that there is no competent evidence to sustain such a finding, and the same is not supported by the evidence and is contrary thereto in that all the tariffs are not in evidence, certain typical examples being used as illustrative.

4. The Court erred in finding the following fact, which was requested by plaintiff, to wit:

"That in amending the tariffs of rates on petroleum and petroleum products as set forth in plaintiff's petition to make effective the four and one-half cents advance referred to in paragraphs [264] V and VI of said petition, the carriers under federal control included in the tariffs a provision to the effect that when the charges on a continuous through movement are obtained by the combination of separately established rates, the increase of four and one-half cents per hundred pounds will apply as to the total of such combined rates in effect June 24, 1918 (some tariffs provided May 25, 1918), fifth class rates as increased June 25, 1918, not to be exceeded, and to the effect that said increase of four and one-half cents per hundred pounds would not apply to each separately established rate,"

which is contained in Paragraph II of the findings of fact requested by plaintiff and in Paragraph II

of the findings of fact of the Court, for the reason that there is no competent evidence to sustain such a finding, and the same is not supported by the evidence and is contrary thereto, in that the evidence shows without conflict that all the carriers participating in the transporting of plaintiff's shipments were not parties to the tariffs publishing the combination rule and in no instance did said combination rule provide "to the effect that said increase of four and one-half cents per hundred pounds would not apply to each separately established rate." The record shows without conflict that many of the participating carriers over which plaintiff's shipments moved are not named as participating in rates which published the combination rule and that the tariffs of such carriers make no reference thereto.

5. The Court erred in finding the following fact which was requested by plaintiff, to wit:

"That the shipments made by plaintiff referred to in said petition were made pursuant to and in reliance upon the tariffs referred to in paragraphs V to VII, inclusive, in said petition, and particularly in [265] reliance upon the provision referred to in the foregoing finding. That the rates charged and assessed by the defendant James C. Davis (Director General of Railroads) as Agent, for whom the defendant Andrew W. Mellon (Director General of Railroads) as Agent, has been substituted, for transporting the shipments of plaintiff hereinabove set forth, were

in excess of the lawful rates provided in said tariff, and more particularly of the provision in the foregoing finding referred to, in that the four and one-half cent advanced was applied by the defendant James C. Davis (Director General of Railroads) as Agent, for whom the defendant Andrew W. Mellon (Director General of Railroads) as Agent, has been substituted, upon each separate factor contained in the combination of factors making the rate for the continuous through movement for the particular shipment in question in some cases, and in other cases the four and one-half cent advancee was applied on one factor and a twenty-five per cent advance was applied on the other factor contained in the combination of factors making the rate for the continuous through movement for the particular shipment in question, and said advances were not limited to a single four and one-half cent advance on the rate for the continuous through movement made from the combination of factors. That said charges were paid and borne by plaintiff herein,"

which is contained in paragraph III of the findings of fact requested by plaintiff and in paragraph III of the findings of fact of the Court, for the reason that there is no competent evidence to sustain such a finding, and the same is not supported by the evidence and is contrary thereto and that the record shows without conflict that [266] the rates assessed upon plaintiff's shipments were the rates

provided in the applicable tariffs on file with the Interstate Commerce Commission of the carriers participating in the transportation.

6. The Court erred in finding the following fact, which was requested by the plaintiff, to wit:

"That by reason of the facts contained in the foregoing finding, plaintiff was subjected to the payment of rates and charges for the transportation of the shipments referred to in said petition, which said rates were, when exacted, in excess of the legally published rates and charges, in violation of Section 1 and Section 6 of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto, and in violation of Section 10 of the Federal Control Act, and plaintiff was damaged thereby in the sum of \$6,659.33, together with interest thereon at the rate of six per cent (6%) per annum,"

which is contained in Paragraph IV of the findings of fact requested by plaintiff and in Paragraph IV of the findings of fact of the Court, for the reason that the same is not sustained nor supported by competent evidence and is contrary to the evidence which shows without conflict that the rates assessed on plaintiff's shipments referred to in its petition were not in excess of the legally published rates and charges.

7. The Court erred in finding the following fact, which was requested by plaintiff, to wit:

"That five hundred dollars (\$500.) is a rea-

sonable attorney's fee for the prosecution of this action,"

which is contained in Paragraph V of the findings of fact requested by plaintiff and in Paragraph V of the findings of fact of the Court, for the reason that as a matter of law no attorney's fee at all can be allowed for the prosecution of this action against [267] the defendant in his representative capacity as agent of the Government of the United States of America.

8. The Court erred in making the following conclusion of law, which was requested by the plaintiff, to wit:

"Plaintiff is entitled to judgment against the defendant Andrew W. Mellon (Director General of Railroads) as Agent, substituted for James C. Davis (Director General of Railroads) as Agent, as follows: \$590.47 with interest from November 1, 1919 at 6% per annum; \$79.34 with interest from May 15, 1919, at 6% per annum; \$2,149.59 with interest from January 15, 1919, at 6% per annum; \$152.05 with interest from March 22, 1920, at 6% per annum; \$923.46 with interest from April 1, 1919, at 6% per annum; \$420.11 with interest from November 15, 1919, at 6% per annum; \$447.90 with interest from January 15, 1919, at 6% per annum; \$968.18 with interest from May 1, 1919, at 6% per annum; \$928.23 with interest from July 1, 1919, at 6% per annum; together with an attorney's fee of \$500 to be

taxed as costs, and together with costs to be taxed,"

for the reason that the same is not sustained nor supported by any competent evidence and is contrary to the evidence and the law for the reason that the record shows without conflict that the rates assessed on the shipments referred to in the petition on file herein were the lawful tariff rates and because no attorney's fee or costs can be allowed against this defendant in his representative capacity as agent of the Government of the United States of America.

9. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"The petition in this case was not served upon the Director General of Railroads as Agent against whom causes of action may be brought arising out of the operation of the lines of the Atchison, Topeka & Santa Fe Railway Company," [268]

such requested finding being contained in Paragraph 1 of the special findings of fact requested by said defendant, for the reason that such fact was established conclusively by the evidence and is admitted and uncontradicted and because such finding is material to the issues herein.

10. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"The only service in this case was upon the Director-General as a party against whom suits

may be brought for causes of action arising out of the operation or control by the President of the lines of the Southern Pacific Company,"

such requested finding being contained in Paragraph 2 of the special findings of fact requested by said defendant, for the reason that such fact was established conclusively by the evidence and is admitted and uncontradicted and because such finding is material to the issues herein.

11. The Court erred in refusing to find the following fact, which was requested by the defendant Mellon, to wit:

"The rate from Ardmore, Okla., to Holtville, Cal., as actually published in the tariffs on file with the Interstate Commerce Commission was \$1.16 per 100 pounds, being a combination of 94½ cents from Ardmore to Grape, Cal., published in Agent Countiss' tariff I. C. C. 1067, 9 cents from Grape to El Centro, Cal., published in Southern Pacific Tariff I. C. C. No. 4067, and 12½ cents from El Centro to Holtville, published in Holton Interurban Tariff I. C. C. No. 13 (this was used in the record as typical of the rates where one of the lines over which the shipments moved was not under Federal Control),"

such requested finding being contained in Paragraph 3 of the special [269] findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues herein.

12. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"The rate from Ardmore, Okla., to Clarkdale, Ariz., as actually published in the tariffs on file with the Interstate Commerce Commission was \$1.20 per 100 pounds, being a combination of 94½ cents from Cedar Glade, Ariz., published in Agent Countiss' tariff I. C. C. No. 1048, and 25½ cents from Cedar Glade to Clarkdale as published in Atchison, Topeka & Santa Fe Railway Tariff I. C. C. No. 6853 (this was used in the record as typical of rates where all lines over which shipments moved were under federal control)."

such requested finding being contained in Paragraph 4 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues herein.

13. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"Rule 3 of Tariff Circular 18-A of the Interstate Commerce Commission requires that every tariff shall show the name of the issuing carrier, carriers or agents,"

such requested finding being contained in Paragraph 5 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

14. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit: [270]

“Rule 4-b of Tariff Circular 18-A of the Interstate Commerce Commission requires that every tariff shall contain the names of the issuing carriers and the names of the participating carriers,”

such requested findings being contained in Paragraph 6 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

15. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

“Rule 4-d of Tariff Circular 18-A of the Interstate Commerce Commission requires that every tariff shall contain an alphabetical index of the points from and to which the rates apply together with the names of the states in which located,”

such requested finding being contained in Paragraph 7 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

16. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

“Rule 4-h of Tariff Circular 18-A of the Interstate Commerce Commission requires that all rules, regulations or conditions which in

any way affect the rates named in the tariff shall be shown, and that no rule or regulation shall be included which in any way substitutes for any rate in the tariff a rate found in any other tariff or made up on any combination or plan other than that clearly stated in specific terms in the tariff of which the rule and regulation is a part, except that a rule and regulation in another tariff be [271] made a part of such rate schedule by specific reference "governed by rules and regulations shown in — I. C. C. No. —," and that when a tariff makes reference to another tariff the I. C. C. number of such other tariff must be given, and when such tariff referred to is the publication of another carrier or an agent, the initials of such other carrier or name of such agent respectively must be shown in connection with the I. C. C. number,"

such requested finding being contained in Paragraph 8 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

17. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"Rule 5-b of Tariff Circular 18-A of the Interstate Commerce Commission requires that tariffs containing basing or proportional rates must specify clearly the extent and manner of their use and the tariffs that are specially intended for use in connection with published bas-

ing rates must show the I. C. C. number of the tariff in which the bases can be found," such requested finding being contained in Paragraph 9 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

18. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"The Interstate Commerce Commission did not authorize the Director-General of Railroads to waive any of its tariff rules except rule 4-i of [272] Circular 18-A (which requires an explicit statement of rates) and rule 9-e of Circular 18-A (which limits the number and size of effective supplements to any tariffs)," such requested finding being contained in Paragraph 10 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

19. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"Atchison, Topeka & Santa Fe Railway Tariff I. C. C. 6853 is limited by its terms to apply only between Cedar Glade, Ariz., and Clarkdale, Ariz. (in so far as this particular case is concerned),"

such requested finding being contained in Paragraph 11 of the special findings of fact requested by said defendant, for the reason that such fact was

conclusively proven by the evidence and is material to the issues of the case.

20. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"Southern Pacific Tariff I. C. C. 4067 is limited by its terms to apply only between Grape, Cal. and El Centro, Cal. (in so far as the shipments in this case are concerned),"

such requested finding being contained in Paragraph 12 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

21. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"The shipments from Ardmore, Okla., to Holtville, Cal., moved over the Gulf, Colorado & Santa Fe, the [273] Chicago, Rock Island & Pacific, the Chicago, Rock Island & Gulf, the El Paso & Southwestern, the Southern Pacific and the Holton Interurban Railway,"

such requested finding being contained in Paragraph 13 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

22. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"The shipments from Ardmore, Okla., to Humboldt, Ariz., moved over the Gulf, Colo-

rado & Santa Fe and the Atchison, Topeka & Santa Fe,"

such requested finding being contained in Paragraph 14 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

23. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"The shipments from Ardmore, Okla., to Clarkdale, Ariz., moved over the Gulf, Colorado & Santa Fe and the Atchison, Topeka & Santa Fe,"

such requested finding being contained in Paragraph 15 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

24. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"The shipments from Wichita Falls, Tex., to Humboldt, Ariz., moved over the Wichita Valley, Texas & Pacific and Atchison, Topeka & Santa Fe,"

such requested finding being contained in Paragraph 16 of the special findings of fact requested by said defendant, for the reason that [274] such fact was conclusively proven by the evidence and is material to the issues of the case.

25. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"The other lines over which the shipments moved from Ardmore, Okla., and Wichita Falls, Texas, to Clarkdale, and Humboldt, Ariz., are not named as participating carriers in Atchison, Topeka & Santa Fe Tariff I. C. C. No. 6853 which published the combination rule and the rate from Cedar Glade, Ariz., one factor used in making the combination rate,"

such requested finding being contained in Paragraph 17 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

26. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"Other lines over which the shipments moved from Ardmore, Okla., to Holtville, Cal., are not named as participating carriers in Southern Pacific Tariff I. C. C. No. 4067 which published the combination rule and the rate from Grape, Cal., to El Centro, Cal., one factor used in making the combination rate,"

such requested finding being contained in Paragraph 18 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

27. The Court erred in refusing to find the fol-

lowing fact which was requested by the defendant Mellon, to wit:

“Agent Countiss’ Tariff I. C. C. No. 1067 does not contain a combination rule and makes no reference to Southern Pacific Tariff I. C. C. No. 4067 (the [275] tariff containing the combination rule and used as typical),”

such requested finding being contained in Paragraph 19 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

28. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

“Holton Interurban Tariff I. C. C. 13 does not contain a combination rule and makes no reference to Southern Pacific Tariff I. C. C. No. 4067,”

such requested finding being contained in Paragraph 20 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

29. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

“Agent Countiss’ Tariff I. C. C. No. 1048 does not contain a combination rule and makes no reference to Atchison, Topeka & Santa Fe Tariff I. C. C. No. 6853,”

such requested finding being contained in Paragraph 21 of the special findings of fact requested

by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

30. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"In no instance were all lines handling the shipments parties to the tariff carrying the combination rule,"

such requested finding being contained in Paragraph 22 of the special findings of fact requested by said defendant, for the reason that [276] such fact was conclusively proven by the evidence and is material to the issues of the case.

31. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"In no instance was there a cross reference to the tariff publishing the combination rule," such requested finding being contained in Paragraph 23 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

32. The Court erred in refusing to find the following fact which was requested by the defendant Mellon, to wit:

"The Amador Central Railroad Company, Holton Interurban Railway Company, Nevada Copper Belt Railroad Company, Nevada-California-Oregon Railway, Pacific Electric Railway Company, Virginia & Truckee Railway,

San Diego & Arizona Railway Company and Yosemite Valley Railroad Company were not under federal control during the time covered by this suit,"

such requested finding being contained in Paragraph 24 of the special findings of fact requested by said defendant, for the reason that such fact was conclusively proven by the evidence and is material to the issues of the case.

33. The Court erred in refusing to make the following conclusion of law requested by defendant Mellon in Paragraph a of his requested conclusions of law, to wit:

"This suit is barred by the statute of limitations,"

for the reason that the pleadings show upon their face that this suit is barred by the provisions of Subdivision (a) of Section 206 of the Transportation Act 1920. [277]

34. The Court erred in refusing to make the following conclusion of law requested by defendant Mellon in Paragraph b of his requested conclusions of law, to wit:

"Plaintiff cannot recover because the Director-General as Agent of all lines participating in the transportation was not served,"

because the evidence shows without conflict, particularly by Defendant's Exhibit "A," that the only service of process in this case upon the Director-General of Railroads and/or Agent of the President under Section 206 of the Transportation Act, 1920, was upon the Agent of the President against

whom causes of action arising out of the possession, use or operation by the President (under the provisions of the Federal Control Act, or Act of August 29, 1916) of the railroad or system of transportation of Southern Pacific Company.

35. The Court erred in refusing to make the following conclusion of law requested by defendant Mellon in Paragraph c of his requested conclusions of law, to wit:

"Even if the order of the Commission is valid, plaintiff is not entitled to recover any sum but \$1,293.59 with interest, that being the reparation on the shipments which moved in connection with the Southern Pacific Company,"

because the evidence shows without conflict, particularly by Defendant's Exhibit "A." that the only service of process in this case upon the Director-General of Railroads and/or Agent of the President under Section 206 of the Transportation Act, 1920, was upon the Agent of the President against whom causes of action arising out of the possession, use or operation by the President (under the provisions of the Federal Control Act, or Act of August 29, 1916) of the railroad or system of transportation of Southern Pacific Company.

36. The Court erred in refusing to make the following conclusion of law requested by defendant Mellon in Paragraph d of his [278] requested conclusions of law, to wit:

"The findings of fact of the Commission do not support the order because the findings are

that there was a holding out of a method of constructing a through rate which must be protected whereas the order awards reparation on account of overcharges. An overcharge is a charge collected in excess of the legal tariff charge."

37. The Court erred in refusing to make the following conclusions of law requested by defendant Mellon in paragraphs e, f, q and r of his requested conclusions of law, to wit:

"The legal rate from Ardmore, Okla., to Clarkdale, was \$1.20 per 100 pounds, being a combination of 94½ cents from Ardmore to Cedar Glade, Ariz., published in Agent Countiss' Tariff I. C. C. No. 1048, and 25½ cents from Cedar Glade to Clarkdale as published in Atchison, Topeka & Santa Fe Tariff I. C. C. No. 6853 (this was used in the record as typical of instances where all lines over which shipments moved were under federal control.)"

"The legal rate from Ardmore, Okla., to Holtville, Cal., was \$1.16 per 100 pounds, being a combination of 94½ cents from Ardmore, to Grape, Cal., published in Agent Countiss' Tariff I. C. C. No. 1067, 9 cents from Grape to El Centro, Cal., published in Holton Interurban Tariff I. C. C. No. 13 (this was used in the record as typical of the cases where one of the lines over which the shipments moved was not under federal control)."

"Atchison, Topeka & Santa Fe Tariff I. C. C. 6853 did not hold out any method of construct-

ing through rates from Ardmore, Okla., and Wichita Falls, Texas, to Clarkdale and Humboldt, Ariz." [279]

"Southern Pacific Tariff I. C. C. 4067 did not hold out any method of constructing a through rate from Ardmore, Okla., to Holtville, Cal."

for the reason that such conclusions were justified and required by the documentary and oral evidence of record herein.

38. The Court erred in refusing to make the following conclusions of law requested by defendant Mellon in paragraphs g, h, i, j and k of his requested conclusions of law, to wit:

"The tariff cannot be extended beyond its territorial limits except by specific cross-reference as required by the rules of the Commission and the law."

"Rules 3, 4 and 5 of Tariff Circular 18-A are mandatory and could not be waived by the Commission."

"Tariffs must state plainly the places between which the property will be carried."

"Tariffs must show the rates applying between the points shown therein and all rules and regulations which in any way change or affect the rates."

"The names of all carriers parties to any tariffs must be shown therein."

for the reason that such conclusions are justified and required by the evidence and the law.

39. The Court erred in refusing to make the

following conclusions of law requested by defendant Mellon in paragraphs l, m, n, o, p, x and y of his requested conclusions of law, to wit:

“No carrier can participate in the transportation unless it is shown as party to the tariff.”

“Shippers are conclusively presumed to know the legal rates.”

“The Director-General cannot hold out any rate which is not actually published in the tariff.” [280]

“The Director-General cannot hold out any method of constructing a rate other than that legally published in the tariff.”

“The Director-General cannot protect any rate or method of making rates other than those actually published in the tariff.”

“The legally published rate must be applied.”

“No rate can be applied except that published in the tariffs lawfully on file with the Interstate Commerce Commission,”

for the reason that such conclusions are justified and required by the evidence and the law.

40. The Court erred in refusing to make the following conclusion of law requested by defendant Mellon in paragraph s of his requested conclusions of law, to wit:

“Plaintiff is not entitled to recover because he has not proved any damage due to any holding out by the defendant that rates made by the use of the combination rule would be protected.”

41. The Court erred in refusing to make the following conclusion of law requested by defendant Mellon in paragraph t of his requested conclusions of law, to wit:

"This is a suit against the United States," because the record so shows on its face and it is a fact admitted to be true.

42. The Court erred in refusing to make the following conclusions of law requested by defendant Mellon in paragraphs u and v of his requested conclusions of law, to wit:

"Plaintiff is not entitled to recover costs."

"Plaintiff is not entitled to recover attorney's fees,"

for the reason that there is no authority in law for the recovery of [281] costs and/or attorney's fees against the defendant Mellon in his representative capacity as Agent of the President under the provisions of Section 206 of the Transportation Act, 1920.

43. The Court erred in refusing to make the following conclusion of law requested by defendant Mellon in paragraph w of his requested conclusions of law, to wit:

"The order of the Commission is unlawful and void,"

for the reason that the findings are that there was a holding out of a method of constructing a through rate which must be protected, whereas the order of the Commission awards reparation on account of overcharges, an overcharge being a charge collected in excess of the legal tariff rate; and for

the further reason that the order of the Commission is not supported by any competent evidence and is contrary thereto and is against the law because it requires the defendant to apply an unpublished rate in violation of law and particularly of Section 6 of the Interstate Commerce Act, as amended.

44. The Court erred in refusing to make the following conclusion of law requested by defendant Mellon in paragraph z of his requested conclusions of law, to wit:

“Plaintiff is not entitled to a judgment in any amount,”

for the reasons hereinbefore assigned.

45. The Court erred in refusing to make the following conclusion of law requested by defendant Mellon in paragraph aa of his requested conclusions of law, to wit:

“The judgment should be for defendant,” for each and all of the reasons set forth in paragraphs a to z, inclusive, of the conclusions of law proposed by said defendant Mellon.

46. The Court erred in overruling the objections of defendant Mellon to plaintiff's proposed findings of fact and conclusions of law, for each and all of the reasons stated in said defendant's [282] written objections.

47. The Court erred in finding and concluding that the Commission's order for the payment of reparation was valid; and in failing to find that the same was null and void, for the reasons hereinbefore assigned.

48. The Court erred in entering judgment in favor of plaintiff and against the defendant Mellon, and in failing and refusing to enter judgment in favor of said defendant Mellon and against the plaintiff, for each and all of the reasons set forth in the proposed conclusions of law of said defendant Mellon hereinabove set forth.

WHEREFORE, said defendant Mellon prays that the judgment of the Southern Division of the District Court of the United States for the Northern District of California, Second Division, may be reversed.

ALEX M. BULL,
JAMES E. LYONS,

Attorneys for Defendant Mellon.

Receipt of the within assignment of errors is admitted this 22d day of November, 1926.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 22, 1926. [283]

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR.

On this 22d day of November, 1926, came Andrew W. Mellon (Director-General of Railroads) as Agent, one of the defendants above named, by Alex M. Bull and James E. Lyons, his attorneys, and filed herein and presented to this court his petition praying for the allowance of a writ of error and the assignment of errors intended to be urged

by him, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

And it appearing that under Sections 1,000 and 1,001 of the United States Revised Statutes no bond, obligation or security is required from the United States or any department of the Government either to prosecute said suit or to answer in damages or costs, and that defendant is sued herein as representative of a department of the Government of the United States:

NOW, THEREFORE, on consideration whereof, this Court does hereby allow the writ of error and orders that said writ issue without requiring the filing of any bond. [284]

Dated at San Francisco, California, this 22d day of November, 1926.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Nov. 22, 1926. [285]

[Title of Court and Cause.]

PRAECLYPE FOR TRANSCRIPT OF RECORD.
To the Honorable Walter B. Maling, Clerk of the
Above-entitled Court:

You are hereby requested to make a transcript

of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to a writ of error allowed in the above-entitled cause, and to include in such transcript the following papers, to wit:

1. Petition or complaint.
2. Demurrer to complaint.
3. Opinion dated June 23, 1925, of Judge Partridge, overruling demurrer.
4. Minute order overruling demurrer.
5. Motion of James C. Davis to dismiss.
6. Minute order overruling motion to dismiss.
7. Amendment and supplement to petition.
8. Stipulation and order that the demurrer of James C. Davis to the original petition or complaint on file herein and motion of said defendant to dismiss said original petition or complaint shall stand as a demurrer and motion to dismiss the said original petition as amended and supplemented by the amendment and supplement to said petition on file herein.
9. First amended answer of James C. Davis.
[286]
10. Stipulation waiving jury.
11. Stipulation and order substituting defendants.
12. Opinion of Judge St. Sure on ordering judgment for plaintiff.
13. Findings of fact and conclusions of law, dated October 11, 1926, and entitled "Decision."
14. Judgment on findings.

15. Stipulation relative to matters to be included in and omitted from bill of exceptions.
16. Bill of exceptions.
17. Petition for writ of error.
18. Assignments of error.
19. Order allowing writ of error.
20. The writ of error.
21. Citation on writ of error.
22. This praecipe.
23. Clerk's certificate to transcript.

Dated: San Francisco, California, this 23d day of November, 1926.

ALEX M. BULL,
JAMES E. LYONS,

Attorneys for Defendant Mellon.

Receipt of copy of the within praecipe for transcript of record is admitted this 23d day of November, 1926.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 23, 1926. [287]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD
ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the District Court of the United States for the Northern District of California do hereby certify the foregoing 287 pages, numbered from 1 to 287 inclusive, to be full, true and correct copies of the record and proceed-

ings as enumerated in the praecipe for record on writ of error as the same remains on file and of record in the above-entitled case in the office of the Clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the costs for the foregoing return to the writ of error is \$61.00, that said amount was paid by the defendant and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said District Court this 8th day of December, 1926.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States
for the Northern District of California. [288]

[Title of Court and Cause.]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judge or Judges of the Southern Division of the District Court of the United States for the Northern District of California, Second Division, GREETING:

Because in the record and proceedings, as also in the rendition of judgment, of a plea which is in the said District Court before you, or some of you, between Standard Oil Company (California), a corporation, plaintiff, and Andrew W. Mellon (Di-

rector-General of Railroads), as Agent, et al., defendants, a manifest error hath happened to the great damage of the said Andrew W. Mellon (Director-General of Railroads), as Agent, defendant, as by his complaint appears;

And we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, State of California, where said court is sitting on the 22d day of December, 1926, and within thirty (30) days from the [289] date hereof, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 22d day of November, 1926.

[Seal] WALTER B. MALING,
Clerk of the United States District Court for the
Northern District of California.

By Harry L. Fouts.

Allowed by:

A. F. ST. SURE,
United States District Judge.

Receipt of copy of the within writ of error is admitted this 23d day of November, 1926.

PILLSBURY, MADISON & SUTRO,
JMC.,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 23, 1926. [290]

RETURN TO WRIT OF ERROR.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States
for the Northern District of California. [291]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

United States of America,

Northern District of California,—ss.

The President of the United States to Standard
Oil Company (California), a Corporation,
GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city and county of San Francisco, State of California, in said circuit, on the 22d day of December, 1926, being within thirty (30) days from date hereof, pursuant to a writ of error filed in the Clerk's office of the Southern Division of the United States District Court for the Northern District of California, Second Division, wherein Andrew W. Mellon (Director-General of Railroads), as Agent, is the plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable A. F. ST. SURE,
United States District Judge for the Northern District of California, this 22d day of November, 1926.

A. F. ST. SURE,
United States District Judge.

Receipt of copy of the within citation on writ of error is admitted this 23d day of November, 1926.

PILLSBURY, MADISON & SUTRO,
JMC.,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 23, 1926. [292]

[Endorsed]: No. 5022. United States Circuit Court of Appeals for the Ninth Circuit. Andrew W. Mellon (Director-General of Railroads), as Agent, Plaintiff in Error, vs. Standard Oil Company (California), a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed December 8, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

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